U.S. Securities and Exchange Commission ("SEC") on August 18, 1999 (SEC File No. 3-9977).

The Commonwealth based its allegations against Petitioner upon two subsections of Title 63, Chapter 1 of the Pennsylvania Consolidated Statutes, as amended. As set forth in Counts One and Two to the Amended Orders to Show Cause, the Commonwealth represented to the Respondent that Petitioner's "right to practice" before either a state or federal agency had been revoked. The Commonwealth relied upon the language contained in 63 P.S. §9.9a(a)(8) which provides that the Commonwealth may "revoke, suspend or refuse to renew any license issued under this act, or may censure the holder of any such certificate, registration or license, for any one or any combination of causes.

The Commonwealth further alleged in Count Three in the Amended Order to Show Cause that Petitioner engaged in "unprofessional conduct" as defined in 63 P.S. §9.9a(a)(5) (effective February 3, 1997), relying upon a document prepared by the PSC in its "Findings of Fact, Conclusions of Law, and Order" dated December 22, 1999. Other than blanket assertions and illusory conclusions of law, no specific facts to support the allegations were set forth in this document.

On February 19, 2002, the Petitioner timely filed his Answers to the Amended Order to Show Cause categorically denying the Commonwealth's allegations set forth in all three counts of the Amended Order to Show Cause. Other than the two documents identified above, the Commonwealth offered no other documentary evidence or identified any testifying witnesses to support any of the allegations made against the Petitioner.

A hearing was held before the Respondent on August 28, 2002. At the hearing, Petitioner objected to introduction of the two exhibits attached to the Amended Orders to Show Cause into evidence. However, Respondent's Counsel provisionally allowed their admission despite the Petitioner's objections. Nonetheless, Respondent's Counsel officiating at the hearing prevented Petitioner from cross-examining or questioning the contents of either the SEC or PSC's orders and the "findings of fact" contained therein, contending that Petitioner's right to do so constituted an impermissible "collateral attack" against those documents and the veracity of their contents.

On October 10, 2003, the Respondent issued an Adjudication and Order revoking the certificate of certified public accountant (No. CA-013872-L) issued to the Petitioner, effective November 10, 2003. A copy of the Adjudication and Order appears as Appendix "D" attached to this Petition. On October 27, 2003, the Petitioner filed a Petition for Reconsideration (or in the Alternative, for Stay or Injunction Pending Appeal) with the Respondent. An affidavit filed by the Petitioner that was attached to that Petition noted that on the basis of responses received from the PSC's counsel to subpoenas issued to representatives of the PSC in 2001 relative to another matter pending (but later dismissed) in the U.S. District Court for the Eastern District of Pennsylvania, representatives of the PSC disclosed that no documents then existed to substantiate or prove all of the PSC's earlier factual allegations.

Petitioner timely filed his Notice of Appeal to the Commonwealth Court on November 7, 2003. Based upon written submissions by briefs presented by Petitioner and the Respondent, the Commonwealth Court rendered its opinion and Order affirming the decision of the Board on July 26, 2004.

This decision has been reported at 856 A.2d 864 (Pa.Commonwealth 2004), and appears as Appendix C to this Petition. The Commonwealth Court concluded that documents relied upon by Respondent issued by the SEC were inadmissible "hearsay" and must be stricken from the record (with exceptions). *Shapiro*, 876 A.2d 876. The PSC's adjudication (other than the "offer of settlement contained therein") was found to be within the exceptions to the hearsay rule and admitted. Id. at 874. Petitioner's timely filed Application for Rearguement/Reconsideration filed August 9, 2004 was denied by the Commonwealth Court on September 17, 2004 in an unreported decision without opinion. Petitioner's timely filed Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied without opinion by Order dated April 12, 2005 (reported at 872 A.2d 174 and appears as Appendix A to this Petition.)

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Discretionary Review Because this Case, and the Facts Thereof, Provide the Opportunity to Review an Issue of First Impression Regarding the Definition of the "Right to Practice" before a Federal or State Agency

Petitioner submits that the Respondent's Adjudication and Order, as well as the Commonwealth Court's reported decision issued July 26, 2004, misapprehended and overlooked controlling material facts and authority law or facts when reaching the conclusion that the Petitioner violated 63 P.S. § 9.9a(a)(8) on the basis that his "right to practice" (as the term is defined in 17 CFR § 201.102(f)) before both the SEC and PSC was revoked. In reaching that conclusion, the Commonwealth Court acknowledged that "in the absence of such

a definition, it is appropriate for the Board to turn to federal securities laws for guidance." *Shapiro* at 877.

The Commonwealth Court relied on the Board's assertion in quoting the following excerpt from 17 CFR § 201.102(f)):

> ""[P]racticing before the [SEC] shall include, but shall not be limited to
>
> (1) Transacting any business with the [SEC]..."

However, as set forth in the full body and text of the statute, subsection (f) in its entirety reads as follows:

> "(f) Practice defined. For the purposes of these Rules of Practice, practicing before the Commission shall include, but shall not be limited to:
>
> (1)Transacting any business with the Commission; and
>
> (2)The preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other professional or expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other professional or expert."

The plain and clear language of the federal statute appears to cover the conduct of only those professionals transacting business with the SEC in the nature of having prepared statements, opinions, or other professional assistance rendered to SEC registrants. The two subsections of this definition must be read together as a result of Congressional intention as a result of the word "and" appearing instead of "or" as the Respondent would suggest. The scope of cover-

age for this subsection of the federal statute is limited to practice by attorneys, accountants, engineers or certain other professionals or experts before the SEC. Registered representatives and broker-dealers in securities (whose performance is regulated elsewhere in the federal regulations) were not intended to be covered within the confines of subsection (f) of this statute as practitioners before the SEC.

As noted in the Commonwealth Court's opinion in the instant case, the Pennsylvania Securities Act does not define what is meant to "practice" before the PSC. Id at 877. Little, if any guidance, is available. Recently, the United States Court of Appeals for the District of Columbia Circuit clarified the extent to which the SEC's Rules of Practice enumerated in 17 CFR § 201.102 cover practice before the SEC. See *Marrie v. Securities and Exchange Commission*, 2004 WL 1585848. As noted in the *Marrie* opinion, "Rule 102(e) ... provides the Commission with a means to ensure that the professionals on whom it relies "perform their tasks diligently and with a reasonable degree of competence." 2004 WL 1585848, *3 (D.C. Cir.)) Subsection (f)(2) to the statute delineates those professionals that come within the population of individuals that "practice" before the SEC. Nowhere in the statute or in the clarification offered in the *Marrie* opinion do registered representatives and broker/dealers of securities come within the intended boundaries of the statute. The SEC's authority to discipline professionals has long been distinguished from the execution of its substantive enforcement functions. *Marrie* at *7. Those functions including, but not limited to, regulation over broker/dealers of securities and their registered licensees are covered elsewhere in Title 17.

As noted above, neither the SEC nor the PSC altered, limited, or impacted the ability of the Petitioner to practice ei-

ther as a certified public accountant, attorney, or engineer. The Respondent and Commonwealth Court's misapprehension of the federal statute in contrast to apparent Congressional intent significantly impacted the conclusion that the Petitioner's "right to practice" before either a federal or state agency had been revoked, as that was the sole basis that the Respondent sought to discipline the Petitioner pursuant to 63 P.S. §9.9a(a)(8). This issue is of paramount importance to all licensed professionals nationwide who may unknowingly become entangled in administrative disciplinary proceedings for conduct unrelated to the profession that they may practice. For this reason, the Court should grant certiorari and issue a summary reversal.

II. The Failure of Respondent and the Lower Courts to Recognize Petitioner's Right to Present Evidence, Cross-Examine Witnesses, and Contest Unproven Allegations of Fact Contained in the PSC's Adjudication Violates His Fundamental Due Process Rights to a Meaningful Hearing.

The PSC's "Findings of Fact" against the Petitioner were clearly promulgated pursuant to settlement documents which were never intended to be utilized for any other than their stated purpose, i.e. "solely" to conclude the matters set forth therein. The Commonwealth Court allowed their admission based upon the finding that the contents of the PSC's adjudication were "trustworthy" because they were "developed through a process during which Petitioners were afforded an opportunity to be heard and to challenge." *Shapiro* at 874. However, the "hearing" relied upon by Respondent and the lower courts in reaching this conclusion relates to the Petitioner's settlement with the PSC with regards to his licensing as a registered securities agent with Welco, and had nothing

to do with his license to practice as a certified public accountant.

Both the Respondent and Lower Courts relied upon the decision reached in *Khan v. State Board of Auctioneer Examiners*, 842 A.2d 936 (Pa. 2004) in concluding that Petitioner's right to contest the trustworthiness of the contents of PSC's adjudication was an impermissible collateral attack. *Shapiro* at 882. The Pennsylvania Supreme Court properly recognized the principle that "due process is fully applicable to adjudicative hearings involving substantial property rights..." *Khan* at 945. The Respondent and Lower Courts apparently misapprehended the distinction between the holding in *Khan* and the instant matter insofar as the proceedings in the Khan case involved reciprocal disciplinary action of an individuals right to practice as an auctioneer from state to state. In contrast, the disciplinary action sought to be taken against Petitioner in his capacity as a certified public accountant was not reciprocal to any prior settlement made with respect to his ability to be licensed in Pennsylvania to sell securities as a registered representative or broker/dealer in securities. The Commonwealth Court concluded that the PSC's adjudication and issuance of unproven statements cloaked as "findings of fact" would be admissible to prove the existence of the facts found therein if the circumstances "do not indicate lack of trustworthiness". *Shapiro* at 874. However, in overlooking the distinction between the reciprocal nature of the matters at issue in *Khan* as opposed to the non-reciprocal nature of the proceedings in the instant matter, the Commonwealth Court misapprehended the fact that the Petitioner was never afforded a meaningful opportunity to be heard or to challenge the truth, accuracy, and trustworthiness of the PSC's findings for purposes of determining whether or not a violation of the CPA licensing statutes had

in fact occurred. This violation of both procedural and substantive due process is inconsistent with the procedural and substantive due process mandate that Petitioner be afforded a meaningful opportunity to be heard relative to matters affecting his CPA licensing.

Misapprehension of the non-reciprocal nature of the proceedings in the instant matter led the Commonwealth Court to the conclusion it reached on the issue of collateral estoppel, effectively preventing the Petitioner from exercising his due process right to question, confront, and cross-examine witnesses and documentary evidence that a violation of § 9.9a(a)(16) of the CPA Law had in fact occurred after February 3, 1997, the effective date of the statute. *Shapiro* at 883. The Commonwealth Court misapprehended the fact that no "consent judgment" was ever entered against the Petitioner; rather, as part and parcel of a global settlement and solely for purposes of that settlement, Petitioner consented to the administrative action taken by the PSC. Petitioner neither admitted nor denied any of the PSC's "findings of fact." *Shapiro* at 874. The Commonwealth Court concluded that the PSC's Offer of Settlement standing alone was inadmissible under Pa.R.E. 408. *Shapiro* at 875. The Commonwealth Court's conclusion that the PSC's "findings of fact", were admissible for purposes of proving that any violation of 63 P.S. § 9.9a(a)(16) actually occurred after February 3, 1997 is inconsistent with that result, in that the "findings of fact" were issued solely as part of the overall settlement agreement and for no other purpose. Issues regarding the Petitioner's ability to practice in his capacity as a licensed certified public accountant before the PSC were never at issue. Consequently, none of the "findings of fact" should have been immune from collateral attack in a non-reciprocal matter.

The Pennsylvania Supreme Court in the *Khan* decision found due process to be fully applicable to adjudicative hearings involving substantial property rights, including the right of an individual to pursue a livelihood or profession. *Khan* at 945. However, in weighing the competing interests of governmental intervention as opposed to these due process rights, the Pennsylvania Supreme Court concluded "a reciprocal disciplinary forum is not an appropriate venue for relitigating the merits of a foreign disciplinary action." *Khan* at 951. The decision, however, is silent as to whether these conclusions would be the same in a non-reciprocal matter where the licensee loses the right to fully confront and question the allegations made against him in an unrelated matter. In the concurring opinion to the *Khan* decision, Justice Saylor suggests that such a deprivation of rights may create an undue risk of an erroneous deprivation. *Khan* at 952.

This Court has long recognized the importance in providing meaningful safeguards of procedural due process to ensure fundamental fairness at administrative hearings. *Goldberg v. Kelly*, 397 U.S. 254 (1970). This Court noted that where credibility and veracity are at issue written submissions are an unsatisfactory basis for a decision as they do not provide the opportunity to confront and cross-examine adverse witnesses. 397 U.S. at 270. In quoting from *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959), this Court paid particular attention to the following:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact-findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that

> it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . .This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . but also in all types of cases where administrative . . . actions were under scrutiny.

In order to meet constitutionally protected due process safeguards, the hearing required by the Due Process Clause must be "meaningful" and "appropriate to the nature of the case." *Bell v. Burson, Director, Georgia Department of Public Safety*, 402 U.S. 535, 541. In *Bell*, this Court concluded that the due process rights of a licensed driver that relied upon that license to pursue his trade and profession were denied when a hearing to consider suspension of his license that excluded consideration of an element essential to the decision whether licenses of the nature there involved should be suspended did not meet this "meaningful" hearing standard. *Bell* at 542. This Court also concluded that a procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case, as procedures adequate to determine a welfare claim may not suffice to try a felony charge. *Bell* at 540.

Respondent's Adjudication and Order dated October 10, 2003 provides an example of the potential abuse which occurs in administrative hearings when procedural and substan-

tive due process safeguards assuring the accused a meaningful hearing are ignored. The "findings of fact" of the PSC upon which the Board based its opinion are nothing other than unsupported assertions against which Board Counsel refused to allow the Petitioner to question. The need for specificity in findings of fact is not simply a matter of administrative accuracy and convenience, but is an essential element as a matter of law, especially in the instant matter where unfounded, unproven assertions of misconduct are levied against the Petitioner without factual evidentiary support.

Parties enter into settlements in this country in a myriad of actions for reasons that often bear no relation to the truth or falsity of the underlying allegations. Indeed, there are many circumstances in which a rational defendant might enter into a consent agreement even when he believes (as is the case in the instant matter) that there is a substantial likelihood of success on the merits. When such an agreement is reached for reasons of cost or otherwise, the parties' intent must be respected.

The Petitioner entered into a settlement with the PSC *solely* for purposes of concluding proceedings before the Pennsylvania Securities Commission and for no other reason. It is questionable as to whether or not a settlement would have been reached if Petitioner had then understood that his license to practice as a certified public accountant would later be at stake. Settlements should be favored, not prevented or precluded. The Petitioner's right to a meaningful hearing with respect to issues relative to an action seeking to revoke his license and right to practice as a certified public accountant without undue governmental interference requires recognition that his due process rights not be ignored. The application of the collateral attack preclusion in

non-reciprocal disciplinary matters clearly ignores those rights. The inability of the Petitioner to question or present evidence to refute the changes levied against him is a per se violation of his constitutionally protected due process rights. Accordingly, to redress this constitutional violation, this Court should grant certiorari and issue a summary reversal.

CONCLUSION

For all of the foregoing reasons, Petition respectfully requests this Court grant certiorari and summary reversal and/or all appropriate relief consistent with the issuance of the Writ.

Respectfully submitted,

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Petitioner Pro Se

APPENDIX

APPENDIX A - ORDER DENYING PETITION FOR ALLOWANCE OF APPEAL, DATED APRIL 12, 2005

IN THE SUPREME COURT
OF PENNSYLVANIA

Kenneth Steven Shapiro,	:	
	:	
Petitioner	:	
v.	:	No. 952 MAL 2004
State Board of	:	Petition for Allowance of
Accountancy,	:	Appeal from the Order of the
	:	Commonwealth Court
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 12th day of April, 2005, the Petition for Allowance of Appeal is hereby DENIED.

APPENDIX B –ORDER DENYING RECONSIDERATION DATED, SEPTEMBER 17, 2004

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

Kenneth Steven Shapiro,	:	
	:	
Petitioner	:	
v.	:	No. 2453 C.D. 2003
State Board of	:	
Accountancy,	:	
	:	
Respondent	:	

ORDER

NOW, September 17, 2004, having considered Petitioner's application for reargument and/or reconsideration, and Respondent's answer, the application is denied.

BY THE COURT:

JAMES GARDNER COLINS
President Judge

APPENDIX C – OPINION, FILED JULY 26, 2004

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Shapiro, Petitioner
v.
State Board of Accountancy, Respondent;
Kenneth Steven Shapiro, Petitioner
v.
State Board of Accountancy, Respondent

No. 2452 C.D. 2003

No. 2453 C.D. 2003

Submitted: April 30, 2004

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge, HONORABLE ROBERT SIMPSON, Judge, HONORABLE JESS S. JIULIANTE, Senior Judge.

OPINION: OPINION BY JUDGE SIMPSON
FILED: July 26, 2004

William Shapiro (William) and Kenneth Steven Shapiro (Kenneth) (collectively, Petitioners), professionals representing themselves, petition for review of an order of the State Board of Accountancy (Board) revoking the certificate of certified public accountant and biennial license of Kenneth and revoking the certificate of certified public accountant of William.

The Commonwealth Bureau of Professional and Occupational Affairs (Bureau) filed Amended Orders to Show Cause against Petitioners, seeking to have their licenses, certificates, registrations, or permits revoked or restricted under the CPA Law.[1] Specifically, the Bureau asserted that, because Petitioners were barred from registration as broker-dealers, agents, or affiliates of any person registered under the Pennsylvania Securities Act of 1972,[2] and also were barred from associating with any broker or dealer under the Securities Exchange Act of 1934,[3] they were subject to discipline under Section 9.1 of the CPA Law.[4] 63 P.S. § 9.9a(a)(8).[5] The Bureau also asserted Petitioners were subject to discipline under the CPA Law for, "engaging in unprofessional conduct," 63 P.S. § 9.9a(a)(16), because they failed to comply with standards promulgated by the Pennsylvania Securities Commission. 63 P.S. § 9.9a(c)(5).

Petitioners filed answers and requests for hearings. The Board held a hearing and issued its 38-page adjudication and

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[1] Act of May 26, 1947, P.L. 318, as amended, 63 P.S. § § 9.1 - 9.16b .

[2] Act of December 5, 1972, P.L. 1280, as amended, 70 P.S. § § 1-101 - 1-612.

[3] 15 U.S.C. § § 78a - 78mm.

[4] Added by Act of September 2, 1961, P.L. 1165.

[5] That section of the CPA Law [HN1] states, "The board may revoke, suspend, limit or otherwise restrict the certificate of a certified public accountant ... for any one or any combination of the following causes: ... (8) Suspension or revocation of the right to practice before any Federal or State governmental agency." 63 P.S. § 9.9a(a)(8).

order, finding Petitioners violated the CPA Law. The Board ordered Kenneth to surrender his certificate of certified public accountant and license documents, and ordered William to surrender his certificate of certified public accountant.

In doing so, the Board made the following Findings of Fact. The Board found William was sole shareholder, secretary/treasurer, and director of Welco Securities, Inc. (Welco) and Kenneth served as Welco's president and director. Board Finding of Fact (F.F.) No. 4. Petitioners also were controlling shareholders of Walnut Equipment Leasing Company, Inc. (Walnut) and its wholly owned subsidiary, Equipment Leasing Corporation of America (ELCOA), both of which financed leases of small business equipment. F.F. No. 5. William was chief executive officer, financial officer and accountant of both Walnut and ELCOA and president of ELCOA. Id. Kenneth served as vice-president of both companies. Id.

Welco registered with the Securities and Exchange Commission (SEC) as a broker-dealer in 1983. F.F. No. 6. Kenneth served as general securities principal, while William served as financial/operations principal and general securities principal. Id. Welco's primary function was to underwrite and sell securities issued by Walnut and ELCOA. F.F. No. 7.

Walnut and ELCOA experienced annual operating losses that grew larger each year. F.F. No. 8. Walnut and ELCOA generated funds to pay their expenses and interest payments to existing debentureholders by selling new issues of debt securities as unsecured debentures. F.F. No. 9. Investors purchasing those unsecured debentures incurred substantial and immediate risk of losing their investment principals due to the precarious financial condition of Walnut and ELCOA. Id.

Petitioners, through Welco, marketed and distributed the unsecured debentures to their brokerage clients. F.F. No. 10. Welco also solicited investors through kiosks located in airports, bus stations, and other public places. F.F. No. 10. People who inquired at the kiosks were led to believe Welco would review their brokerage account applications to determine if investing in the unsecured debentures was suitable for them. F.F. No. 11. If Welco deemed the investment suitable, it would trade for the debentures through the new brokerage account. Id. Current investors were solicited from time to time to make additional purchases; again, those investors were led to believe Welco would review the suitability of the investment to each investor's needs. Id.

Welco's clients were generally unsophisticated and risk-averse investors for whom the highly speculative nature of the unsecured debentures made them an unsuitable investment. F.F. No. 12. However, Welco and Petitioners recommended and sold the unsecured debentures to all but a handful of their clients. Id.

Welco and Petitioners sold approximately $ 6 million worth of unsecured debentures in violation of state registration requirements. F.F. No. 13. Welco and Petitioners encouraged investors from states where the debentures were not registered to use an address in a state where the debentures were registered; this subjected Welco, Walnut, and ELCOA to penalties from state regulators that would have materially affected the companies' financial status. Id. Welco and Petitioners did not disclose these facts to investors. Id.

From October 1996 to August 1997, Welco and Kenneth failed to make and keep current books and records for Welco. F.F. No. 14. During that same time period, Welco and Kenneth concealed violations of state registration re-

quirements by maintaining altered client account forms. F.F. No. 15.

From December 1995 through August 1997, Welco and Petitioners aided and abetted a person, who was not registered with the SEC, to act as a broker-dealer by allowing him to place trades for debentures through Welco, use Welco's account forms and sales materials, and maintain customer accounts at Welco. F.F. No. 16. Welco also paid this unregistered broker-dealer commissions for his sales of debentures. Id.

Walnut and ELCOA filed for bankruptcy in 1997. F.F. No. 17. Based on that filing, it seemed likely most debentureholders would lose most of their assets. Id.

From 1988 through 1997, Welco and Petitioners, pursuant to this fraudulent scheme and in violation of federal securities laws, sold approximately $ 60 million worth of the unsecured debentures to 7,000 investors nationwide. F.F. No. 18.

In August 1999, the SEC filed a four-count complaint against Welco and Petitioners in the United States District Court for the Eastern District of Pennsylvania, charging them with violating various federal securities laws. F.F. No. 20.[6] That same date, the district court entered a final judgment and order of permanent injunction against Welco and Petitioners. F.F. No. 21. The SEC thereafter issued a consent order in which it revoked Welco's broker-dealer registration and barred Petitioners from association with any broker or dealer. F.F. No. 22.

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[6] This Finding of Fact is mistakenly numbered in the Board's adjudication as Finding of Fact Number 29; however, it is clear from the numeric progression that it is, in fact, Number 20.

Welco also registered as a broker-dealer with the Pennsylvania Securities Commission (PSC) in 1983, and Petitioners registered with PSC as agents of Welco. F.F. No. 23. Welco underwrote Walnut and ELCOA securities, and Petitioners were affiliates of Welco, Walnut, and ELCOA. F.F. Nos. 24-25.

Because they were not registered as securities with the SEC, Kenneth advised PSC no offers or sales of certain ELCOA and Walnut certificates would be made in Pennsylvania. F.F. No. 26. Nevertheless, those certificates were sold to Pennsylvania residents without being registered in Pennsylvania. F.F. Nos. 27, 30.

Welco's registered agents used material misrepresentations to induce people living in and outside Pennsylvania to purchase Walnut certificates and to give fake addresses in states other than Pennsylvania in order to execute the sales; Petitioners knew or should have known about this practice. F.F. No. 28. Additionally, Welco and Petitioners offered and sold Walnut certificates to investors without disclosing they were violating Pennsylvania securities law. F.F. No. 29. Some investors were not given a prospectus or any other meaningful disclosure documents. Id.

At least 26 ELCOA certificates were sold to at least 21 Pennsylvania residents, for an amount of at least $ 292,190. F.F. No. 30. None of those certificates was registered in Pennsylvania. Id. Twenty-one of those ELCOA certificates were sold by a person named John J. McGarry who was not a registered agent with Welco. F.F. No. 31.

Welco, Petitioners, and McGarry used a single fictitious address in New York as the address of those Pennsylvania residents who purchased ELCOA certificates. F.F. No. 32. In

some cases, the investors' Pennsylvania addresses on their applications were concealed with typewriter correction strip. Id. Petitioners knew or should have known of this practice. Id. The ELCOA certificates were offered without disclosing they were being made in violation of Pennsylvania law, and some of the investors were not given a prospectus or other disclosure documents. F.F. No. 34.

Some of Welco's registered representatives, through misrepresentations and nondisclosures, induced investors either to not redeem or to delay redemption of Walnut and ELCOA certificates. F.F. No. 35. Welco and Petitioners knew or should have known of this practice. Id.

Welco, Petitioners, and Welco's registered representatives recommended their investors purchase Walnut and ELCOA certificates without having grounds to believe the certificates were suitable for each investor's needs. F.F. Nos. 36 - 37. Welco and Petitioners did not establish a system of procedures for detecting and preventing securities violations. F.F. No. 38. Welco and Petitioners did not fulfill their fiduciary duty to act primarily for the benefit of Pennsylvania customers, nor did they maintain high standards of commercial honor and just and equitable principles of trade. F.F. No. 39. Welco and Petitioners engaged in dishonest and unethical conduct in the securities business and took unfair advantage of their customers. F.F. No. 40.

PSC issued its Findings of Fact, Conclusions of Law, and Order (PSC Adjudication) in December 1999. R.R. at 18a - 37a. In doing so, PSC revoked Welco's registration as a broker-dealer and revoked Petitioners' registrations as agents of Welco. R.R. at 35a. PSC permanently barred Welco from being registered as a broker-dealer or from being affiliated with a broker-dealer in Pennsylvania. Id. PSC also perma-

nently barred Petitioners from: 1) representing an issuer as an agent offering or selling securities (with certain exceptions); 2) acting as promoters, officers, directors, or partners of an issuer offering or selling securities in Pennsylvania (with certain exceptions); and 3) being registered as broker-dealers, agents, or affiliates of any person registered under the *Pennsylvania Securities Act*. R.R. at 35a - 36a. PSC ordered Welco and Petitioners to pay $ 20,000 in costs to the Commonwealth of Pennsylvania. R.R. at 36a.

After making these extensive Findings of Fact, the Board found Petitioners violated 63 P.S. § 9.9a(a)(8), since their rights to practice before both the SEC and PSC were revoked. Further, the Board found Petitioners engaged in unprofessional conduct in violation of 63 P.S. § 9.9a(a)(16). Accordingly, the Board revoked Kenneth's certificate of certified public accountant and current biennial license, and revoked William's certificate of certified public accountant. This appeal followed.[7]

I.

Petitioners first argue their cases should be dismissed because the Board failed to hold a hearing within 90 days after Petitioners filed their answers in accord with 63 P.S. § 2203(d).[8] The relevant portion of that statute [HN3] states, "In all disciplinary matters before a licensing board or com-

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[7] Our review in an appeal from a state agency adjudication is limited to a determination of whether constitutional rights were violated, an error of law was committed, or necessary findings of fact are supported by substantial evidence. *Trakes v. Pub. Sch. Employees' Ret. Sys.*, 768 A.2d 357 (Pa. Cmwlth. 2001).

[8] Section 3 of the Act of July 2, 1993, P.L. 345.

mission, hearings shall commence within 90 days after the date on which an answer is filed." Id. Petitioners argue this portion of the statute is mandatory, not directory, and therefore, because Petitioners' answers were filed February 19, 2002, but the hearing was not held until August 28, 2002, they were entitled to dismissal.

This Court consistently holds that, [HN4] "Where a statute fixes a time for an adjudicating body, the language of the statute will be construed as directory because the courts cannot punish any of the litigants for the actions of the adjudicator." *Schulze v. Bureau of Prof'l and Occupational Affairs*, 794 A.2d 984, 988 (Pa. Cmwlth. 2002) (quoting *Pub. Serv. Water Co. v. Pennsylvania Pub. Util. Comm'n, 165 Pa. Commw.* 463, 645 A.2d 423, 430 (1994)) (emphasis in original). While failure to follow a mandatory statute renders the proceedings void, failure to follow a directory one does not. *West Penn Power Co. v. Pennsylvania Pub. Util. Comm'n*, 104 Pa. Commw. 21, 521 A.2d 75 (Pa. Cmwlth. 1987).

In Schulze, this Court considered the following language from *63 P.S. § 2203(d)*: "A decision shall be rendered within 180 days after the record is closed." We concluded the language was directory rather than mandatory since it purports to fix a time within which an adjudicating body must perform an act. Similarly, the statutory language here requiring hearings to be held within 90 days after the date on which an answer is filed is directed toward the adjudicating body and, therefore, is directory rather than mandatory.

Also, it is noteworthy that Petitioners do not claim actual prejudice from the delay. Considering the foregoing, we see no merit whatsoever in Petitioners' contention.

II.

Petitioners next argue the record does not support the Board's findings that they violated any provisions of the CPA Law.

A.

First, Petitioners argue the Board's Findings of Fact are based solely on uncorroborated hearsay and, thus, must be stricken.

Ordinarily, hearsay evidence is inadmissible unless some exception applies. Pa.R.E. 802. However, that rule is relaxed in proceedings before administrative agencies. *Rox Coal Co. v. Workers' Comp. Appeal Bd. (Snizaski)*, 570 Pa. 60, 807 A.2d 906 (2002). Petitioners rely on what is commonly known as the "Walker rule", set forth in *Walker v. Unemployment Comp. Bd. of Review*, 27 Pa. Commw. 522, 367 A.2d 366 (Pa. Cmwlth. 1976). There, this Court established the following standard to apply to the use of hearsay evidence during administrative proceedings:

> (1) Hearsay evidence, Properly objected to, is not competent evidence to support a finding of the Board; (2) Hearsay evidence, Admitted without objection, will be given its natural probative effect and may support a finding of the Board, If it is corroborated by any competent evidence in the record, but a finding of fact based Solely on hearsay will not stand.

Id. at 370 (citations omitted). Our Supreme Court adopted the Walker rule and affirms its use in appropriate cases. See, e.g., *Rox Coal Co.*

Petitioners did not raise hearsay objections to the documents they now dispute.[9] Accordingly, we must determine, first, whether the documents constitute hearsay; second, if they are hearsay, we must determine if the Board's Findings of Fact are based solely on hearsay or whether there is some other competent evidence to corroborate those findings. Because we determine there are three different categories of evidence, we address each in turn.

1. PSC Adjudication

Petitioners object to the PSC Adjudication[10] on two grounds: 1) that it constitutes hearsay that may not form the sole basis for findings of fact; and 2) that the findings of fact contained in the PSC Adjudication were never admitted to or

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[9] The disputed documents were admitted twice, once at a hearing on December 12, 2001 and again at a hearing on August 28, 2002. The documents were admitted without any objection and marked as Exhibits C-3 and C-6 at the first hearing. Certified Record (C.R.), Volume I, No. 11, Pages 11-12. The only objection raised to their admission at the second hearing (where they were marked as Exhibits C-9 and C-10) was to their authenticity, not that the documents constituted hearsay. R.R. at 125a. The disputed documents were attached to the pleadings filed against each Petitioner.

[10] The PSC Adjudication is found at R.R. 18a-37a and was introduced into evidence as pages 1-20 of Exhibit C-3 (C.R., Volume I, No. 14); pages 0-19 of Exhibit 1 to Exhibit C-6 (C.R., Volume 1, No. 17, Exhibit 1); pages 1-20 of Exhibit 1 to Exhibit C-9 (C.R., Volume II, No. 37, Exhibit 1); and pages 1-20 of Exhibit 1 to Exhibit C-10 (C.R., Volume II, No. 38, Exhibit 1).

For each document appearing multiple times in the record, our discussion applies to all appearances of the document.

found after a hearing and, thus, the Board may not rely on them to make its findings.

We first determine if the PSC Adjudication constitutes hearsay. Pennsylvania did not adopt the federal formulation of including a hearsay exception for public records and reports. Pa.R.E. 803(8) cmt. Rather, at 42 Pa. C.S. § 6103(a), Pennsylvania sets forth separate rules for the admissibility of official records:

> An official record kept within this Commonwealth by any court, district justice or other government unit, or an entry therein, when admissible for any purpose, may be evidenced by ... a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that the officer has the custody. The certificate may be made by any public officer having a seal of office and having official duties with respect to the government unit in which the record is kept, authenticated by the seal of his office ...

When official records are properly certified as § 6103(a) requires, they are admissible as evidence that the governmental action taken therein was in fact taken. 42 Pa. C.S. § 6104(a). In addition:

> A copy of a record authenticated as provided in section 6103 disclosing the existence or nonexistence of facts which have been recorded pursuant to an official duty ... shall be admissible as evidence of the existence or nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.

42 Pa. C.S. § 6104(b). The Comments to Pa.R.E. 803(8) indicate this rule is meant to function as an exception to the hearsay rule for public records. ("An exception to the hearsay rule for public records is provided by 42 Pa. C.S.A. § 6104.")

Accordingly, if the PSC Adjudication is properly certified, it is admissible to prove the existence of the facts found therein if the circumstances do not indicate lack of trustworthiness. We conclude the PSC Adjudication is properly certified. It is accompanied by a document titled, "Pennsylvania Securities Commission - Certification", in which M. Joanna Cummings, Secretary of the PSC, certifies that the attached PSC Adjudication is a true and correct copy of the PSC Adjudication as it remains on file in the PSC offices. The Certification is signed by Cummings and accompanied by the seal of the PSC. Because it is properly certified, the PSC Adjudication may serve as a basis for findings of fact relative to the facts set forth therein so long as the circumstances do not indicate a lack of trustworthiness.

Petitioners argue the facts set forth in the PSC Adjudication are not trustworthy and may not be relied on because they were never admitted or found after a hearing. Petitioners point to the language in the PSC Adjudication that notes, "Respondents, without admitting or denying the allegations therein, have submitted the attached Offer of Settlement to the Commission solely for the purpose of settling this proceeding and consent to the Commission's making findings and conclusions and imposing sanctions." R.R. at 19a. We disagree.

Here, the contents of the PSC Adjudication are trustworthy because they were developed through a process during which Petitioners were afforded an opportunity to be heard

and to challenge. Their refusal to use the opportunity does not imperil the trustworthiness of the process. *Kahn v. State Bd. of Auctioneer Exam'rs, 785 A.2d 512, 516 n. 5 (Pa. Cmwlth. 2001).*[11]

In Kahn, the State Board imposed reciprocal discipline on an auctioneer whose license was revoked in Virginia and Maine. We noted reciprocal discipline could not be imposed where it was, "neither based on an admission of misconduct nor any finding of fact regarding the alleged misconduct." *Id. at 518* (emphasis added). In Kahn, we permitted reciprocal discipline where the consent agreement from Maine stated, "Mr. Kahn denies, does not admit, but does not contest allegations of [the complaint]." Id.

That language is similar to the language in the PSC Adjudication, "Respondents, without admitting or denying the allegations therein, ... consent to the Commission's making findings and conclusions and imposing sanctions." R.R. at 19a. Further, the PSC adjudication contains findings of fact as required by *Kahn*. Therefore, those findings may serve as a basis for the Board's Findings of Fact in support of the Board's imposition of discipline on Petitioners.

Because the PSC Adjudication meets the requirements of *§ § 6103 and 6104*, it constitutes an exception to the hearsay rule and, therefore, does not fall under the Walker rule. Accordingly, those Findings of Fact made by the Board that are

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[11] Our Supreme Court affirmed this decision "in all respects". *Kahn v. State Bd. of Auctioneer Exam'rs, 577 Pa. 166, 842 A.2d 936 (2004).* No explanation is given for the difference in spelling between this Court ("Kahn") and the Supreme Court ("Khan").

supported by the PSC Adjudication are supported by competent evidence,[12] and we affirm those Findings.[13]

2. Settlement documents with PSC

The next document of which Petitioners complain is the Offer of Settlement filed with the PSC by Petitioners.[14]

The Offer of Settlement was included as an attachment to the PSC Adjudication and, thus, is admissible under the above analysis involving official records. However, *§ 6103* [HN11] makes clear that it only applies to official records that are "admissible for any purpose". *42 Pa. C.S. § 6103(a).* As this Court noted, "The phrase 'when admissible for any purpose' in *Section 6103* indicates that this section cannot be used to introduce otherwise inadmissible evidence." *Pennsylvania State Police, Bureau of Liquor Control Enforcement*

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[12] The Board Findings of Fact that are supported by the PSC Adjudication and, therefore, are affirmed include Nos. 4-5, 23-40, and 42-43.

[13] We note this also disposes of Petitioners' argument that no competent evidence exists to find violations after February 3, 1997, the effective date of the amendment to the CPA Law that included a definition of "unprofessional conduct." *63 P.S. § 9.9a(c).* The PSC Adjudication specifically found violations through August 8, 1997 (Paragraphs 20, 27, 42).

[14] The Offer of Settlement is found at R.R. 38a - 42a and was introduced into evidence as pages 21-25 of Exhibit C-3 (C.R., Volume I, No. 14); unnumbered pages at the end of Exhibit 1 to Exhibit C-6 (C.R., Volume 1, No. 17, Exhibit 1) (including two copies of the Offer of Settlement and proposed findings of fact, conclusions of law, and order); pages 21-25 of Exhibit 1 to Exhibit C-9 (C.R., Volume II, No. 37, Exhibit 1); and pages 21-25 of Exhibit 1 to Exhibit C-10 (C.R., Volume II, No. 38, Exhibit 1).

v. 139 Horseshoe Corp., 157 Pa. Commw. 283, 629 A.2d 290, 291 (Pa. Cmwlth. 1993). Accordingly, although the Offer of Settlement was attached to a properly authenticated official record, if it is inadmissible under some other rule it must not be admitted.

We determine the Offer of Settlement is inadmissible under *Pa.R.E. 408*, which states,

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

However, receipt of the Offer of Settlement was harmless error, because no findings of fact or conclusions of law were based on it. Additionally, Petitioners admitted in their pleadings that they entered into an Offer of Settlement with PSC. R.R. at 78a, 83a.

3. Documents Concerning the SEC Action

Finally, Petitioners complain that the circumstances described in the SEC Action are hearsay.[15] We agree.

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[15] These documents are found at R.R. 43a - 75a and were introduced into evidence as Exhibit 2 to Exhibit C-3 (C.R., Volume I, No. 14, pages 26-58); Exhibit 2 to Exhibit C-9 (C.R., Volume II, No. 37, Exhibit 2, pages 26-58); and Exhibit 2 to Exhibit C-10 (C.R., Volume II, No. 38, Exhibit 2, pages 26-58). These documents only appear three times in the record, because they are not attached to Exhibit C-6.

Similar to the provisions discussed above for admission of official records of the Commonwealth or its agencies, the Pennsylvania legislature provides a mechanism for the admission of official records from other jurisdictions within the United States. That rule states,

> An official record kept within the United States ... when admissible for any purpose may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that the officer has the custody.

42 Pa. C.S. § 5328(a). Accordingly, in order for these documents, which constitute official records of the SEC[16] and the United States District Court for the Eastern District of Pennsylvania,17 to be admissible as an exception to the hearsay rule, they must be properly certified as provided in § 5328.

No certification appears in the record, and no records custodian appeared to testify personally to the authenticity of the documents. Therefore, these documents constitute hearsay.

[16] R.R. at 43a - 45a, captioned "United States of America - Before the Securities and Exchange Commission - Order Instituting Public Proceedings, Making Findings and Imposing Remedial Sanctions"; and R.R. at 74a - 75a, captioned "United States Securities and Exchange Commission Litigation Release No. 16253/August 17, 1999".

[17] R.R. at 46a - 56a, captioned "Complaint"; R.R. at 57a - 62a, captioned "Final Judgment and Order of Permanent Injunction"; R.R. at 63a - 68a, captioned "Consent of William S. Shapiro and Welco Securities, Inc."; and R.R. at 69a - 73a, captioned "Consent of Kenneth S. Shapiro".

Having determined these documents are hearsay, we must apply the *Walker* rule and determine if any of the Board's Findings of Fact are solely supported by these documents; if so, we must strike those Findings.

Board Findings of Fact Nos. 6 - 22 pertain to the SEC events and are based on these hearsay documents. The only other references of record regarding the SEC events are Petitioners' pleadings,[18] in which they admit the SEC issued an Order Instituting Public Proceedings, Making Findings and Imposing Remedial Sanctions against them (R.R. at 79a, 84a), admit the SEC's Order barred them from associating with any broker or dealer under the Securities Exchange Act (Id.), and admit the Order also revoked the registration of Welco, of which William was owner, secretary, treasurer, financial/operational principal and general securities principal and Kenneth was president and general securities principal (Id).

Accordingly, the Board's Findings of Fact 6 - 22 are solely based on hearsay, with the exception of that portion of Finding of Fact No. 20 that notes the SEC initiated proceedings against Petitioners and that portion of Finding of Fact No. 22 that notes Welco's broker-dealer registration was revoked and Petitioners were barred from associating with any broker or dealer, as those portions of those Findings of Fact are corroborated by the Answers filed by Petitioners. Under the

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[18] The Amended Orders to Show Cause filed against Petitioners, and their Answers thereto, were admitted into evidence as Exhibits Commonwealth-9, -10, -11, and -12. Although Petitioners object to the admission of the exhibits to the Amended Orders to Show Cause as discussed at length above, Petitioners do not argue the pleadings themselves were improperly admitted.

Walker rule, then, those Findings of Fact will not stand and must be stricken (with the noted exceptions).

B.

Having determined which Findings of Fact are supported by competent evidence, we turn to Petitioners' argument that those Findings of Fact are insufficient to support the conclusion that Petitioners violated the CPA Law. Specifically, Petitioners assert their right to practice before a state agency was not revoked, their right to practice before a federal agency was not revoked, and they did not engage in unprofessional conduct.

1. Practice before the PSC

In Count One, the Bureau asserts Petitioners are subject to discipline under the CPA Law because their rights to practice before the PSC were revoked. The Bureau relies on § 9.9a(a)(8), which [HN14] permits revocation, suspension, limitation, or restriction of licenses for "Suspension or revocation of the right to practice before any Federal or State governmental agency." 63 P.S. § 9.9a(a)(8). The Bureau asserted, and the Board agreed, that the PSC discipline had the effect of barring Petitioners from practice before PSC.

Petitioners counter they are not subject to discipline under this section because their right to practice as accountants before a state agency was not revoked or suspended. Further, Petitioners state the things they are barred from doing before the PSC do not constitute "practice" before the PSC. We address each argument in turn.

Petitioners' argument that, in order to be disciplined under § 9.9a(a)(8) their right to practice as accountants must have

been revoked or suspended, is unpersuasive. [19] Initially, we note the oft-stated principle that, "The interpretation of a statute by those charged with its execution is entitled to great deference, and will not be overturned unless such construction is clearly erroneous." *Caso v. Workers' Comp. Appeal Bd. (Sch. Dist. of Phila.), 576 Pa. 287, 839 A.2d 219_, 576 Pa. 287, 839 A.2d 219, 221 (2003).* The Board interprets the term "right to practice" to mean, not just the narrow right to practice accounting, but the broad right to any type of licensed practice..

When the words of a statute are clear and free from ambiguity, we may not disregard the letter of the statute under the pretext of pursuing its spirit. *1 Pa. C.S. § 1921.* Further, although we must "listen attentively to what a statute says[;]one must also listen attentively to what it does not say." *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co, 567 Pa. 514, 525, 788 A.2d 955, 962 (2001).* We may not insert a word the legislature failed to supply into a statute. *Key Sav. & Loan Ass'n v. Louis John, Inc., 379 Pa. Super. 226, 549 A.2d 988, 991 (Pa. Super. 1988).*

The legislature chose not to insert words limiting this provision to those persons whose right to practice accounting before any state board was revoked or suspended. We cannot insert those words into the statute. Therefore, the Board's interpretation that *§ 9.9a(a)(8)* applies to revocation or suspen-

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[19] We note the only other case interpreting *§ 9.9a(a)(8), Goldberger v. State Bd. of Accountancy, 833 A.2d 815 (Pa. Cmwlth. 2003),* involved a situation where a licensee's right to practice before the SEC as an accountant was revoked. However, nothing in that case limits the application of *§ 9.9a(a)(8)* to revocation of a right to practice as an accountant.

sion of any right to licensed practice before any state agency is not erroneous. [20]

Next, Petitioners advance the remarkable assertion that their right to practice before the PSC was not revoked. Petitioners argue being registered with the PSC does not amount to a right to practice before the PSC.

The Board found Petitioners' right to practice before the PSC was revoked. The Board noted the Pennsylvania Securities Act and its regulations do not define what is meant to "practice" before the PSC. The Board asserted that, in the absence of such a definition, it is appropriate for the Board to turn to federal securities laws for guidance. See generally, *Martin v. ITM/International Trading & Marketing, Ltd., 343 Pa. Super. 250, 494 A.2d 451 (Pa. Super. 1985).*

The Board then looked to the Code of Federal Regulations, *17 C.F.R. § 201.102(f)*, which states, "Practicing before the [SEC] shall include, but shall not be limited to: (1) Transacting any business with the [SEC] ...." Applying that definition to the PSC, the Board concluded it is clear that Petitioners are barred from transacting any business with PSC.

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[20] This is particularly so where *§ 9.9a(a)(7)* specifically provides for discipline for, "cancellation, revocation, suspension or refusal to renew his authority to practice as a certified public accountant or public accountant by any other state or foreign jurisdiction ...." *63 P.S. § 9.9a(a)(7).* If we were to give *§ 9.9a(a)(8)* the exact same interpretation, it would render *§ 9.9a(a)(8)* mere surplusage, which is inconsistent with principles of statutory interpretation. *Lynch v. Owen J. Roberts Sch. Dist., 430 Pa. 461, 469, 244 A.2d 1, 5 (1968)* ("[T]he Legislature is presumed not to have intended its laws to contain surplusage.").

The Board's interpretation of the term "right to practice" was not erroneous. Petitioners were barred from registration as broker-dealers, agents, or affiliates of any person registered under § 301 of the Pennsylvania Securities Act, *70 P.S. § 1-301.*[21] *Section 301(a)* notes, "It is unlawful for any person to transact business in this State as a broker-dealer or agent unless he is registered under this act." Since Petitioners were barred from registration, they may not transact business as broker-dealers or agents in this Commonwealth or appear before the PSC in that capacity. This falls squarely within the definition of "practice" provided in *17 C.F.R. § 201.102(f)* quoted above. Accordingly, the Board did not err in finding Petitioners' right to practice before the PSC was revoked.

2. Practice before the SEC

Petitioners admit they are barred from associating with any broker or dealer by the SEC. Under the same analysis as above, the Board did not err in finding Petitioners' right to practice before the SEC was revoked.

3. Unprofessional Conduct

Finally, Petitioners argue they did not engage in unprofessional conduct. They assert there are no facts of record to support a finding they failed to comply with any standard promulgated by a recognized standard-setting body as required by *63 P.S. § 9.9a(c)(5).*

The Board's finding that Petitioners engaged in unprofessional conduct was not erroneous. Among other violations, the PSC found Petitioners violated its regulation[22] found at

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[21] Act of December 5, 1972, P.L. 284, as amended.

[22] This regulation is a "standard" set by the PSC, a body empowered to enact regulations. "Standard" is defined as, "something that

64 Pa. Code 305.019. [HN18] That regulation states, "Every person registered under section 301 of the act is a fiduciary and has a duty to act primarily for the benefit of its customers. Further, these persons shall observe high standards of commercial honor and just and equitable principals of trade in the conduct of their business." *64 Pa. Code 305.019(a).*

The Board specifically found: 1) Petitioners knew or should have known "two of Welco's registered agents used material misrepresentations to induce persons in and outside of Pennsylvania to purchase Walnut certificates and to give fictitious residential addresses in states other than the states of their actual residence in order to execute the sales" (F.F. No. 28); 2) Petitioners "offered and sold Walnut certificates to investors without disclosing that the offers and sales were made in willful violation of Pennsylvania law" (F.F. No. 29); 3) Petitioners "used a single fictitious address in New York as the home address of Pennsylvania residents to whom McGarry had sold ELCOA certificates. In some cases, the investor's Pennsylvania address on a purchase application was concealed with a typewriter correction strip reflecting the fictitious New York address, a practice about which [Petitioners] knew or should have known" (F.F. No. 32); 4) Petitioners knew or should have known " some of Welco's registered representatives, through misrepresentations and nondisclosures, induced investors either not to redeem or to delay redemption of Walnut and ELCOA certificates" (F.F. No. 35); 5) Petitioners "recommended the purchase of Walnut and ELCOA certificates to investors without having rea-

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is established by authority, custom, or general consent as a model or example to be followed." Webster's Third New International Dictionary 2223 (1993). The regulation falls within that definition as it sets forth the model for broker-dealers to follow.

sonable grounds to believe that the recommendation was suitable for each investor's needs" (F.F. No. 36); and 6) Petitioners knew or should have known "Welco's registered representatives recommended the purchase of Walnut and ELCOA certificates to investors without having reasonable grounds to believe that the recommendation was suitable for each investor's needs." F.F. No. 37.

Given the above Findings of Fact, Petitioners failed to comply with the standard set forth by the PSC and, thus, engaged in unprofessional conduct under *63 P.S. § 9.9a(a)(16)*. The Board did not err in finding Petitioners subject to discipline under *§ 9.9a(a)(16)*.

C.

Having determined the Bureau proved Petitioners violated *§ § 9.9a(a)(8) and (16)* of the CPA Law, we address the discipline decided upon by the Board. In deciding to revoke Petitioners' licenses, the Board noted the discipline options from which to choose: 1) censure or reprimand; 2) remedial action such as continuing education or peer review; or 3) restriction, suspension, or revocation of Petitioners' CPA credentials. The Board chose the most restrictive form of discipline, revocation, in order to eliminate the risk of future fraudulent behavior, to deter others from engaging in fraudulent conduct, and to maintain public confidence in state regulation of the profession. Board Adjudication at 36-37.

We acknowledge that the Board improperly relied upon circumstances described in the SEC Action. However, the circumstances described in the SEC Action differ from the facts established in the PSC Adjudication not in character but only in degree. Without question, both matters involved significant fraudulent conduct. The circumstances in the SEC

Action differ in degree because they cover a longer period, involve more money and embrace more victims.

Given the Board's tripartite discipline goals, no abuse of discretion is apparent when the discipline is viewed without the circumstances described in the SEC Action. Thus, considering only the PSC Adjudication, repeated violations occurred over an 11 month period involving at least 21 Pennsylvania residents, for an aggregate amount of at least $ 292,190. F.F. No. 30. Petitioners and others used a fictitious address in New York as the home address of some Pennsylvania purchasers, and at times a purchaser's Pennsylvania address was concealed. F.F. No. 32. Other practices included misrepresentations, F.F. No. 33, failures to disclose, F.F. No. 33, 34, 35, and dishonest and unethical conduct by which Petitioners took unfair advantage of customers. F.F. No. 40. These acts clearly invite the Board's concern for protecting the public, deterring others and maintaining public confidence in regulation of the profession. Further, the ordered discipline is a reasonable method of advancing these discipline goals.

Additionally, a careful review of the record fails to reveal any proof or argument by Petitioners that they are amenable to rehabilitation or that a lesser discipline option should be considered. Rather, Petitioners raise various legal arguments seeking exoneration. This approach supports our conclusion that the ordered discipline should be affirmed.

III.

Petitioners next contend the provisions of the CPA Law under which they were charged are so vague as to amount to

a violation of their constitutional rights.[23] Petitioners specifically complain the following terms are impermissibly vague: 1) the term "right to practice" as used in *63 P.S. § 9.9a(a)(8)* (grounds for discipline in the event of "suspension or revocation of the right to practice before any Federal or State governmental agency"); and 2) the terms "professional" and "standard" as used in *63 P.S. § 9.9a(c)(5)* (unprofessional conduct defined as, "failure to comply with any standard promulgated by any recognized public or private standard-setting body that is applicable to the professional service being performed"). Petitioners argue those terms "do not provide a reasonable, ascertainable standard by which the Petitioners were supposed to act" and they are "subject to many different meanings." Petitioners' Brief at 53.

A statute is presumed to be constitutional, and a person challenging the constitutionality of a statute has a heavy burden of persuasion. *South Union Township v. Dep't of Envtl. Prot., 839 A.2d 1179 (Pa. Cmwlth. 2003)*. A statute is only found to be unconstitutionally vague when "persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Commonwealth v. Cotto, 562 Pa. 32, 37, 753 A.2d 217, 220 (2000)* (citations omitted). A statute is not unconstitutionally vague if, "the terms, when read in context, are sufficiently specific that they are not sub-

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[23] Petitioners do not specify the constitutional provisions allegedly violated. Generally, due process protections under both the Federal Constitution and the Pennsylvania Constitution are coextensive. See *Com. v. Scher, 569 Pa. 284, 803 A.2d 1204 (2002)*(plurality); *Com. v. Kratsas, 564 Pa. 36, 764 A.2d 20 (2001)*. See generally Ken Gormley, Jeffrey Bauman, Joel Fishman & Leslie Kozler, The Pennsylvania Constitution, § § 32.6[c],32.6[h] at 775, 778-79 (2004).

ject to arbitrary and discriminatory application." *Id. at 38, 753 A.2d at 220.*

This Court frequently notes that a "legislative enactment will be deemed invalid 'only if it is so vague and indefinite that courts are unable to determine with any reasonable degree of certainty the intent of the legislative body or so incomplete, conflicting and inconsistent in its provision that it cannot be executed.'" *Nat'l Ass'n of Forensic Counselors v. State Bd. of Soc. Workers, Marriage and Family Therapists and Prof'l Counselors, 814 A.2d 815, 823, (Pa. Cmwlth. 2003)* (quoting *McCoy v. Lincoln Intermediate Unit No. 12, 38 Pa. Commw. 29, 391 A.2d 1119, 1123 (Pa. Cmwlth. 1978)).*

Petitioners fail to carry their heavy burden. Although Petitioners complain the terms are "subject to many different meanings", they do not identify those different meanings. Nor do they explain how the terms are so indefinite as to prevent a court from determining legislative intent to any reasonable degree of certainty. As discussed, this Court is able to determine the legislature's intent with reasonable certainty. Accordingly, the challenged terms are sufficiently specific to prevent arbitrary and discriminatory application, and are therefore not unconstitutionally vague.

IV.

Finally, Petitioners complain the Board commingled its adjudicating and prosecuting functions, thereby violating Petitioners' procedural due process rights. Petitioners point to the following as evidence of the improper commingling: the prosecuting attorney and Board counsel are both employed by the Bureau; the prosecuting attorney and Board counsel share the same post-office address; Board counsel, in re-

sponse to a comment by the prosecuting attorney, stated at the hearing, "Well, I guess, we discussed this off the record prior to the start of the hearing"; no members of the Board were present at the hearing; and no attempt was made to refer the matter to an independent arbiter or administrative law judge. Petitioners also assert Board counsel was biased when he ruled against them in certain evidentiary matters.

The Board counters that attorneys' employment in the same agency is not enough to show an improper commingling. Further, the Board asserts the off-the-record discussion was not an improper exclusive communication, but rather included Petitioners in an exchange regarding evidentiary issues. Finally, the Board argues its counsel's evidentiary rulings were proper and consistent with law.

Due process rights are applicable to hearings before administrative agencies involving substantial property rights, and an individual's right to pursue a profession is such a property right. *Lyness v. State Bd. of Med., 529 Pa. 535, 605 A.2d 1204 (1992).* Due process considerations caution against a commingling of prosecuting and adjudicating functions, and, "even an appearance of bias and partiality must be viewed with deep skepticism." *Id. at 542, 605 A.2d at 1207* (emphasis in original).

Our Supreme Court acknowledges, however, it is not uncommon for some Commonwealth agencies to fulfill both the prosecutorial and adjudicatory functions. *Id. at 545, 605 A.2d at 1209* (quoting *State Dental Council and Examining Bd., 457 Pa. 264, 271-72, 318 A.2d 910, 914-15 (1974)).* Due process requires, "if more than one function is reposed in a single administrative entity, walls of division be constructed which eliminate the threat or appearance of bias." *Id. at 546, 605 A.2d at 1209.* Further, an appearance of bias

must not be focused on the authority granted to a single administrative agency but, rather, focused on the actual process utilized. *Stone and Edwards Ins. Agency, Inc. v. Dep't of Ins., 538 Pa. 276, 648 A.2d 304 (1994).* "The question of due process reasonably involves an inquiry into the nature of the process actually provided." *Id. at 282, 647 A.2d at 307* (emphasis in original).

Our Supreme Court found a due process violation where the same individuals made the decision to bring formal charges, reviewed the evidence at the hearing, and participated in the decision to impose sanctions. *Lyness*. However, our Supreme Court found no due process violation where only a "potential" for commingling arose from the Insurance Department's handling of prosecuting and adjudicating functions. Stone and Edwards. There, our Supreme Court noted,

> Appellants have advanced no claim of actual commingling of functions in the manner in which the Department conducts its investigations, prosecutions and adjudications of insurance law violations. In the absence of any actual commingling, which would give rise to an appearance of bias, partiality or prejudice, Appellants' due process guarantees are being adequately protected.

Id. at 283, 648 A.2d at 308.

None of the circumstances Petitioners reference proves an unfair tribunal. Petitioners' proximity complaints are not enough under the Lyness standard because it is permissible for the same agency to perform both prosecuting and adjudicating functions. Petitioners did not prove actual commingling. Further, they did not try to prove that the Board's counsel and the prosecuting attorney were not properly "di-

vided" as required by *Lyness*. Focusing on the actual process provided, we conclude Petitioners failed to carry their burden of proof.

As to the off-the-record discussion, it is unclear who participated. Careful review of the record strongly suggests Petitioners participated. See R.R. at 129a, 146a. Additionally, the context within which references appear is significant. In particular, Petitioners did not object, and they did not request to make a record. Under these circumstances, references to an off-the-record discussion do not compel a different result.

Similarly, Petitioners' belated challenge to the manner in which the Board hearing was conducted does not support their claim for relief. Board counsel conducted the hearing, at which a record was made for subsequent review by the Board members. The record does not show that Board counsel sat as a Board member, adjudicated the case or prosecuted the case. Rather, as is customary, he provided legal advice, conducted the hearing, and made evidentiary rulings during the hearing. See *Boulis v. State Bd. of Chiropractic, 729 A.2d 645 (Pa. Cmwlth. 1999)*; *Lily-Penn Food Stores, Inc. v. Milk Marketing Bd., 84 Pa. Commw. 585, 481 A.2d 683 (Pa. Cmwlth. 1984)*. Moreover, Petitioners did not object to the absence of Board members at any time when this perceived deficiency could be cured. They may not now rely on this circumstance to support a claim of procedural due process deprivation. See, e.g., *Hinkle v. Workers' Comp. Appeal Bd. (Gen. Elec. Co.), 808 A.2d 1036 (Pa. Cmwlth. 2002)* (issue waived where failure to timely object deprived hearing officer of opportunity to cure any error).

Finally, Petitioners claim Board counsel showed bias by making certain evidentiary rulings against them. In particular, Board counsel denied admission of Petitioners' evidence

on the basis that it was presented for the improper purpose of collaterally attacking findings entered by the PSC. R.R. at 147a-48a. During the hearing, Petitioners claimed they were presenting the evidence for the purpose of rebutting the Commonwealth's evidence. R.R. at 138a. Discussing the findings of the PSC, Petitioners stated, "The findings of fact are basically based upon illusory, I don't even want to call them factual representations. They're allegations that were never supported and denied at all times. There is not one single thread of evidence to show a specific instance of wrong doing in that document." R.R. at 144a-45a.

We discern no error in the evidentiary ruling, because Petitioners are precluded from relitigating the findings made in the proceedings before the PSC. Issue preclusion, also known as collateral estoppel, applies where,

> (1) an issue decided in a prior action is identical to one presented in a later action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action, and (4), the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action.

J.S. v. Bethlehem Area Sch. Dist., 794 A.2d 936, 939 (Pa. Cmwlth. 2002). Collateral estoppel applies between administrative agencies where the policies and goals underlying the matter are the same in both proceedings. *Callaghan v. Workers' Comp. Appeal Bd. (City of Phila.), 750 A.2d 408 (Cmwlth. 2000)*.

Here, the first three elements of collateral estoppel are easily met. First, the issue Petitioners sought to relitigate by introducing the disputed evidence was the same issue before the PSC. In other words, Petitioners sought to prove they did not violate the Pennsylvania Securities Act, an issue decided by the PSC. Second, the PSC entered judgment on the issue, which became final when Petitioners failed to appeal. Third, Petitioners were parties in the PSC action.

The only element requiring discussion is whether Petitioners had a full and fair opportunity to litigate the issue before the PSC, where judgment was entered by consent rather than after a hearing. Although a matter of some disagreement among jurisdictions, in Pennsylvania a judgment entered by consent "binds the parties with the same force and effect as if a final decree has been rendered after a full hearing on the merits." *Zampetti v. Cavanaugh, 406 Pa. 259, 265, 176 A.2d 906, 909 (1962)* (emphasis in original); see also *Pennsylvania Human Relations Comm'n v. Ammon K. Graybill, Jr., Inc., Real Estate, 482 Pa. 143, 148, 393 A.2d 420, 422 (1978)* ("A consent decree has a Res judicata effect, binding the parties with the same force and effect as a final decree rendered after a full hearing on the merits."). As our Supreme Court noted, "The fact that without the consent of the parties the court might not have rendered the judgment does not affect its effect as res judicata. Were this not so, a consent decree would have little value." *Zampetti, 406 Pa. at 265, 176 A.2d at 909.*

Here, Petitioners concede they had the opporunity to litigate before the PSC, but chose not to.[24] Petitioners state they

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[24] At the hearing, Kenneth was questioned by the prosecuting attorney,

agreed to settle the PSC action "solely for purposes of concluding other ongoing and protracted proceedings." Petitioners' Brief at 18. However, Petitioners are bound by the PSC Adjudication to the same extent they would have been if they had chosen to litigate before the PSC rather than enter into a consent judgment.

We also conclude the policies and goals underlying the Pennsylvania Securities Act and the CPA Law are the same. Both statutes specifically prohibit fraudulent practices. Compare Part IV of the Pennsylvania Securities Act, *70 P.S. § § 1-401 - 1-410*, with *Sections 9.1* and 12 of the CPA Law, *63 P.S. § § 9.9a, 9.12*. Both statutes require registration or licensure for professionals. Compare Part III of the Pennsylvania Securities Act, *70 P.S. § § 1-301 - 1-305*, with Sections 8.2[25] and 8.8[26] of the CPA Law, *63 P.S. § § 9.8b,*

MS. GUILFOYLE: And that was, you had, did you have the option of having them litigated? Could you have gone forward rather than accept the offer of settlement made by the PSC? Did you have the option of litigating this case?

MR. KENNETH SHAPIRO: Oh, yes.

R.R. at 152 a-53a. A similar exchange occurred later during the hearing, concerning whether a hearing was scheduled on the PSC action:

MS. GUILFOYLE: So there was, in fact, a hearing scheduled.

MR. KENNETH SHAPIRO: It appears from the record that I've created, yes.

MS. GUILFOYLE: But you chose not to pursue that avenue but rather to accept the offer of settlement?

MR. KENNETH SHAPIRO: With restrictions.

R.R. at 198a - 199a.

[25] Added by Act of September 2, 1961, P.L. 1165.

[26] Added by Act of December 4, 1996, P.L. 851.

9.8h. Also, both statutes authorize disciplinary actions, and civil and criminal sanctions as methods of regulating professional responsibility and protecting the public. Compare Part V of the Pennsylvania Securities Act, *70 P.S. § § 1-501 - 1-514*, with Sections 9, 14, and 15 of the CPA Law, *63 P.S. § § 9.9, 9.14, 9.15*. Moreover, as discussed before, the CPA Law includes as a ground for discipline "revocation of the right to practice before and Federal or State governmental agency." *63 P.S. § 9.9a(8)*. This provision supports our conclusion that the policies and goals of the CPA Law are the same as those of other laws regulating professional practice, including the Pennsylvania Securities Act.

Accordingly, collateral estoppel applies between the PSC and the Board, and Petitioners are collaterally estopped from relitigating the facts underlying the PSC Adjudication. Board counsel neither erred nor demonstrated bias by precluding Petitioners' proof.

For the reasons set forth herein, we affirm the Board's order.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH
COURT OF PENNSYLVANIA

William Shapiro, Petitioner
v.
State Board of Accountancy, Respondent;
Kenneth Steven Shapiro, Petitioner
v.
State Board of Accountancy, Respondent

No. 2452 C.D. 2003

No. 2453 C.D. 2003

Submitted: April 30, 2004

ORDER

AND NOW, this 26th day of July, 2004, the order of the State Board of Accountancy in the above-captioned matter is affirmed.

ROBERT SIMPSON, Judge

APPENDIX D -ADJUDICATION AND ORDER DATED OCTOBER 10, 2003 OF THE STATE BOARD OF ACCOUNTANCY

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

BEFORE THE STATE BOARD OF ACCOUNTANCY

COMMONWEALTH OF PENNSYLVANIA
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
v.
KENNETH STEVEN SHAPIRO, CPA

(DOCKET NO. 0912-55-01)
(FILE NO. 00-55-00290)

COMMONWEALTH OF PENNSYLVANIA
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
v.

WILLIAM SHAPIRO
(DOCKET NO. 0916-55-01)
(FILE NO. 00-55-00289)

ADJUDICATION AND ORDER

SCOTT J. MESSING, DEPUTY COMMISSIONER
BUREAU OF PROFESSIONAL AND
OCCUPATIONAL AFFAIRS

JAMES P. KEASEY, CPA, CHAIRMAN
STATE BOARD OF ACCOUNTANCY

P.O. BOX 2649
HARRISBURG, PA 17105-2649

HISTORY

This matter comes before the State Board of Accountancy on charges that Kenneth Steven Shapiro, CPA, and William Shapiro violated the CPA Law, Act of May 26, 1947, P.L. 318, as re-enacted and amended, 63 P.S. §9.1, et seq.

On July 25, 2001, the Commonwealth's prosecuting attorney issued the Shapiros separate two-count orders to show cause setting forth the factual allegations and charges against them.

The Commonwealth alleged in the orders to show cause that the Shapiros are credentialed by the Board as certified public accountants; that Kenneth Shapiro maintains a current license to practice public accounting but William Shapiro maintains a current license to practice public accounting but William Shapiro does not; that in August 1999 the U.S. Securities and Exchange Commission ("SEC") issued a consent order in an enforcement action barring the Shapiros from associating with any broker or dealer registered with the SEC; that the SEC's order also revoked the broker-dealer registration of Welco Securities, Inc., ("Welco"), of which the Shapiros were principals and officers; and that in December

1999 the Pennsylvania Securities Commission ("PSC") issued a consent order in an enforcement action revoking the registration of Welco as a broker-dealer, revoking the registrations of the Shapiros as agents for Welco, and permanently barring the Shapiros from being registered as broker-dealers or agents or being affiliates of a broker-dealer or agent in Pennsylvania. Copies of documents relating to the PSC's and SEC's enforcement actions were attached to the orders to show cause.

Based on the factual allegations of the orders to show cause, the Commonwealth charged that the Shapiros had violated Section 9.1(a)(8) of the CPA Law, 63 P.S.§9.9(a)(8) (proscribing certificateholder from having right to practice before state or federal agency suspended or revoked) based on the PSC's enforcement action (count 1) and the SEC's enforcement action (count 2) against them.

On September 21, 2001, the Shapiros filed answers to the orders to show cause admitting the fact of the PSC's and SEC's enforcement actions but denying that the enforcement actions formed a basis for disciplinary action under Seciont 9.1(a)(8) of the CPA Law.

On December 7, 2001, the Shapiros filed motions for summary judgment with supporting memoranda of law.

A formal hearing, scheduled prior to the filing of the motions for summary judgment, was held December 12, 2001, before Board member Edward L. Bianco, II, CPA. Steven Wennberg, Esq., served as Board counsel, and Philip Zarone, Esq., represented the Commonwealth. The Shapiros, both of whom are attorneys represented themselves.

The Commonwealth offered into evidence copies of the orders to show cause without attachments (Exhibits C-1 and

C-2); copies of the Shapiros' answers to the orders to show cause (Exhibits C-4 and C-5); an original certified copy of the PSC's enforcement action against the Shapiros (Exhibit C-6); and copies of the Shapiros' motion for summary judgment (Exhibits C-7 and C-8). Following receipt of the Commonwealth's evidence, the Board, with the concurrence of the parties, continued the formal hearing until the Commonwealth had an opportunity to file a response to the motions for summary judgment.

On December 20, 2001, the Commonwealth filed memorada of law in opposition to the motions for summary judgment as well as amended orders to show cause.

The amended orders to show cause restated the factual allegations and charges of the original orders to show cause; added factual allegations that the PSC is a public standard-setting body that has promulgated standards proscribing unethical conduct by registered agents and that the PSC's enforcement action against the Shapiros included findings that they violated the PSC's standards; and added a charge that the Shapiros had violated Section 9.1(a)(16) of the CPA Law, 63 P.S. §9.9(a)(16) (proscribing certificateholder from engaging in unprofessional conduct) through their violation of the PSC's standards for registered agents (count 3). Copies of documents relating to the PSC's and SEC's enforcement actions were attached to the amended orders to show cause.

On February 19, 2002, the Shapiros filed answers to the amended orders to show cause denying the additional factual allegations and the additional charge that the PSC's and SEC's enforcement actions formed bases formed bases for disciplinary action under Sections 9.1(a)(8) and 9.1(a)(16) of the CPA Law.

On August 6, 2002, the Board denied the Shapiros' motions for summary judgment without prejudice to the Shapiros' incorporating the motions' arguments into their post-hearing briefs.

A formal hearing on the amended orders to show cause was held August 28, 2002. Attorney Wennberg served as Board counsel, and Bridget K. Guilfoyle, Esq., represented the Commonwealth. The Shapiros represented themselves. Prior to the start of the hearing, the Shapiros filed motions to dismiss the amended orders to show cause on the ground that the formal hearing was not timely held after the filing of their answers. Board counsel advised the parties that the Board would consider the motions at the time of its issuance of this Adjudication and Order.

The Commonwealth's evidence, in addition to the exhibits admitted into evidence at the prior formal hearing, consisted of copies of the amended orders to show cause including attachments relating to the PSC's and SEC's enforcement actions (Exhibits C-9 and C-10) and copies of the Shapiros' answers to the amended orders to show cause (Exhibits C-11 and C-12).

Exhibits C-9 and C-10 were provisionally admitted into evidence subject to a ruling on the Shapiros' objection that the attachments – as well as the previously admitted copies of the PSC's and SEC's enforcement actions marked as Exhibits C-3 and C-6 – could not to be used as conclusive evidence that the Shapiros violated federal and state securities laws. (N.T. 22-24) For reasons set forth at pp. 26-28, *infra*, the Board overrules the Shapiros' objection.

The Shapiros' evidence consisted of the testimony of Kenneth Shapiro (N.T. 78-90, 92-97); the testimony of Wil-

liam Shapiro (N.T. 90-92, 94, 97-99); copies of the Board's order scheduling the formal hearing (Exhibits KS-1 and WS –1); copies of the Shapiros' motion to dismiss (Exhibits KS-2 and WS-2); copies of the Shapiros prehearing statements (Exhibits KS-3 and WS-3); copies of the Shapiros' prehearing statements (Exhibits KS-3 and WS 03); copies of cover letters and forms relating to Welco's and the Shapiros' requests for termination of their broker/dealer and agents' registrations, respectively, in February 1999 (Exhibits KS-4, KS-5, KS-6, WS-4, WS–5 and WS-6); copies of March 1999 reports from the central registration depository of the National Association of Securities Dealers ("NASD") evidencing Welco's and the Shapiros' termination requests (Exhibits KS-7, KS-8, WS-7 and WS-8); copies of the answers of the Shapiros and other defendants to the amended order to show cause filed by the PSC in its enforcement action (Exhibits KS-9, KS-10, WS-9, and WS-10); copies of correspondence relating to a continuance of the formal hearing in the PSC's enforcement action (Exhibits KS-11, KS-12, WS-11 and WS-12); copies of correspondence relating to the Shapiros' offer of settlement in the PSC's enforcement action (Exhibits KS-13, KS-14, WS-13 and WS-14); and copies of an invoices, engagement letter, internal control report and audit report prepared by Welco's outside public accounting firm (Exhibits KS-15, KS-16, KS-17, WS,-15, WS-16, WS-17 and WS-18).

The Commonwealth's objection to the admissibility of Exhibits KS-9, KS-10, KS-11, KS-12, KS-13, KS-14, WS-9, WS-10, WS-11, WS-12, WS-13 and WS-14 on the grounds that they are either irrelevant or constitute and impermissible collateral attack against the PSC's and SEC's enforcement actions was sustained. (N.T. 75, 76) Exhibits KS-4, KS-5, KS-6, KS-7, KS-8, KS-15, KS-16, KS-17, KS-18, WS-4,

WS-5, WS-6, WS-7, WS-8, WS-15, WS-16, WS-17 and WS-18 were admitted into evidence to the extent they are not used to collaterally attack the PSC's and SEC's enforcement actions. (N.T. 74-76) The Board sustains the Commonwealth's pending hearsay objection that Exhibits KS-15, KS-16, KS-17, KS-18, WS-15. WS-16, WS-17 and WS-18 also not be used to establish the truth of their contents.

The Commonwealth and the Shapiros filed post-hearing briefs on October 28, 2002, and November 27, 2002, respectively. The Commonwealth filed a reply brief on December 9, 2002.

FINDINGS OF FACT

A. General Information

1. At all times relevant to this disciplinary proceeding, William Shapiro has held a certificate of certified public accountant (No. CA-002865-L), issued by the Board on April 26, 1950. He maintained a biennial license to practice public accounting until April 30, 1994. (Board Records; Exhibit C-12, paras. 1 and 2; N.T. 10-12, 91)

2. At all times relevant to this disciplinary proceeding, Kenneth Shapiro, who is the son of Williams Shapiro, has held a certificate of certified public accountant (No. CA-013872-L), issued by the Board on January 29, 1979, and the biennial license to practice public accounting. His license is currently renewed through April 30, 2004. (Board Records; Exhibit C-3, p.27; Exhibit C-9, paras. 1 and 2 and attachment 2 (p.2); Exhibit C-11, paras. 1 and 2; N.T. 10-12, 82)

3. At all times relevant to this disciplinary proceeding, the Shapiros have been licensed to practice law. (Exhibit C-3, p.32; Exhibit C-9, attachment 2 (p. 7); Exhibit C-10, attachment 2 (p.7); N.T. 79, 81, 91)

4. At all times relevant to this disciplinary proceeding, William Shapiro was sole shareholder of Welco, a corporation within its place of business in Bryn Mawr, PA. Kenneth Shapiro served as Welco's president and director, and William Shapiro served as its secretary/treasurer and director. (Exhibit C-3, pp. 3-5, 27, 31, 32; Exhibit C-6, pp. 5-7; Exhibit C-9, attachment 1 (pp. 3-5) and attachments 2 (pp. 2,6,7); Exhibit C-10, attachments 1 (pp. 3-5) and attachment 2 (pp.2,6,7); N.T. 81, 82, 91)

5. At all the times relevant to the disciplinary proceeding, the Shapiros were controlling owners of Walnut Equipment Leasing Company, Inc. ("Walnut") and its wholly owned subsidiary, Equipment Leasing Corporation of America ("ELOCA"), both of which purportedly engaged in the business of financing leases of small business equipment. William Shapiro was chief executive officer, financial officer and accountant of both companies and president of ELCOA, and Kenneth Shapiro was vice-president of both companies. (Exhibit C-3, pp.3-5,27, 29-32; Exhibit C-6, pp. 5-7; Exhibit C-9, attachment 1 (pp. 3-5) and attachment 2 (pp. 2, 4-7); Exhibit C-10, attachment 1 (pp. 305) and attachment 2 (pp. 2, 4-7))

B. Events Involving the SEC

6. In May 1983, Welco became registered with the SEC as a broker-dealer. Kenneth Shapiro served as a gen-

eral securities principal, and William Shapiro served as financial/operations principal and a general principal. (Exhibit C-3, pp. 27,31, 32; Exhibit C-9, attachment 2 (pp. 2,6,7); Exhibit C-10, attachment 2 (pp. 2,6,7); N.T. 81, 83)

7. Welco's primary source of income was derived from underwriting and selling securities issued by Walnut and ELCOA. (Exhibit C-3, pp. 27, 31-33; Exhibit C-9, attachment 2 (pp. 2, 6-8); Exhibit C-10, attachment 2 (pp.6-8)).

8. At all times relevant to this disciplinary proceeding, Walnut and ELCOA experienced a series of annual operating losses that grew larger each year. Beginning in 1988, the auditors certifying Walnut's financial statements, as consolidated with those of ELCOA, opined that the enterprise might not be able to continue as a going concern. (Exhibit C-3, p.32; Exhibit C-9, attachment 2 (p. 7); Exhibit C-10, attachment 2 (p.7))

9. During their extended period of escalating losses, the only way the Walnut and ELCOA were able to generate funds sufficient to pay their operation expenses and make interest payments to existing debentureholders was by selling to the public new issues of debt securities in the form of unsecured debentures. Given the precarious financial condition of the companies, investors purchasing debentures incurred a substantial and immediate risk of losing their entire investment principal. (Exhibit C-3, p. 33; Exhibit C-9, attachment 2 (p.8); Exhibit C-10, attachment 2 (p.8))

10. The Shapiros, through Welco, marketed, recommended and sold the debentures to their brokerage clients. Welco initially solicited investors through an advertising campaign utilizing kiosks located in airports, bus stations and other public places. The kiosks advertised the rates paid by the debentures, implying that they were as secure as certificates of deposits issued by banks, and invited investors to contact Welco for additional information. (Exhibit C-3, pp. 29, 30, 33; Exhibit C-9, attachment 2 (pp. 4,5,8; Exhibit C-10, attachment 2 (pp. 4,5,8))

11. New investors who responded to kiosk solicitations were sent additional information, including a new brokerage account application. New investors were led to believe that Welco would review each completed application to determine whether the investment was a suitable investment for that investor's needs; if Welco deemed the investment suitable, it would execute a trade for the debentures through the newly opened brokerage account. Welco and the Shapiros later solicited these investors to purchase additional debentures by periodically mailing them sales literature and prospectuses describing new offerings. Existing investors were led to believe that Welco would determine whether each subsequent sale was a suitable investment for that investor's needs. (Exhibit C-3, pp. 33, 34; Exhibit C-9, attachment 2 (pp.8, 9); Exhibit C-10, attachment 2 (pp.8, 9))

12. Welco's clients were generally unsophisticated, risk-averse investors seeking a secure source of income; therefore, the highly speculative nature of Walnut and ELCOA debentures made them an unsuitable in-

vestment for Welco's clients, a fact that Welco and the Shapiros either knew or were reckless in not knowing. Nevertheless, Welco and the Shapiros recommended and sold Walnut and ELCOA debentures to all but a handful of their clients. (Exhibit C-3, pp.27, 29, 34; Exhibit C-9, attachment 2 (pp.2,4,9); Exhibit-10, attachment 2, (pp. 2,4,9))

13. Welco and the Shapiros sold about $6 million in Walnut and ELCOA debentures in violation of state registration requirements. The Shapiros, through Welco, encourage investors who lived in states where offerings were not registered (and, therefore, could not be offered or sold) to use an address in a state in which the offerings were registered. By circumventing state registration requirements, Welco and the Shapiros subjected the enterprise to considerable penalties from state regulators, which would have materially affected the companies' financial status and ability to conduct business. Welco and the Shapiros knowingly or recklessly failed to disclose these material facts to investors. (Exhibit C-3, pp. 30, 34; Exhibit C-9, attachment 2 (pp. 5, 9); Exhibit C-10, attachment 2 (pp. 5, 9))

14. From in or about October 1996 through August 1997, Welco and Kenneth Shapiro failed to make and keep current certain books and records of Welco. (Exhibit C-3, p.37; Exhibit C-9, attachment 2 (p.12); Exhibit C-10, attachment 2 (p.12))

15. From at least October 1996 through August 1997, Welco, aided and abetted by Kenneth Shapiro, concealed the violations of state registration requirements by maintaining, in Welco's files, certain client

account forms that had been altered or falsified by a third-party to conceal the clients' state of residence, a fact which Kenneth Shapiro either knew or was reckless in not knowing. (Exhibit C-3, pp. 34, 35; Exhibit C-9, attachment 2 (pp.9, 10); Exhibit C-10, attachment 2 (pp. 9, 10))

16. From at least December 23, 1995, through August 1997, Welco and the Shapiros, in connection with their sales of debentures, aided and abetted an individual whom they knew or were reckless in not knowing was acting as a broker-dealer without being registered by the SEC. Welco and the Shapiros assisted the unregistered broker-dealer by allowing him to place trades for debentures through Welco, use Welco's new account forms and sales materials, and maintain customer accounts at Welco. In addition, Welco paid the unregistered broker-dealer commissions for his sales of debentures. (Exhibit C-3, p.35; Exhibit C-9, attachment 2 (p.10); Exhibit C-10, attachment 2 (p.10))

17. On August 7, 1997, Walnut and ELCOA filed for bankruptcy. Based on the assets and liabilities reflected in the bankruptcy filings, the debentureholders were likely to lost most of their assets. (Exhibit C-3, p. 32; Exhibit C-9, attachment 2 (p.7); Exhibit C-10, attachment 2 (p.7))

18. From 1988 through August 1997, Welco and the Shapiros, pursuant their fraudulent scheme and in violation of federal securities laws, had sold approximately $60 million of Walnut and ELCOA debentures to approximately 7,000 investors nationwide. (Exhibit C-3, pp.27, 29, 32, 33, 35-38;

Exhibit C-9, attachment 2 (pp.2, 4, 7, 8, 10-12); Exhibit C-10, attachment 2 pp.2, 4, 7, 8, 10-12))

19. On February 24, 1999, during the course of the SEC's investigation of their activities, Welco and the Shapiros filed a written notice with the NASD's central registration depository that Welco had ceased operations as of February 19, 1999. (Exhibits KS-4, KS-5, KS-6, WS-4, WS-5, WS-6; N.T. 82, 83)

20. On August 17, 1999, based on the events set forth in Findings of Fact Nos. 4-18, the SEC filed a four-count civil complaint against Welco and the Shapiros in the United States District Court for the Eastern District of Pennsylvania (Civil Action No. 99-CV-4143), charging them with violating Section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S. §77q(a); sections 10(b), 15(a), 15(c) and 17(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§78j(b), 78o(a), 780(c) and 78q(a); and SEC Rules 10b-5, 15c1-2 and 17a-3, 17 C.F.R. §§ 240.10b-5, 240.15c1-2 and 240.17a-3. (Exhibit C-3, pp. 27, 29-39; Exhibit C-9, attachment 2 (pp. 2, 4-14); Exhibit C-10, attachment 2 (pp. 2,4014))

21. On same date, with the consent of Welco and the Shapiros, who neither admitted nor denied the allegations of the SEC's complaint, the federal district court entered a final judgment and order of permanent injunction. The court permanently enjoined Welco and the Shapiros from committing violations of federal securities laws and regulations and directed them to pay "disgorgement" of $2.55 million. The court waived the disgorgement payment because of Welco's and the Shapiros' financial inability to pay.

(Exhibit C-3, pp.27, 40-56; Exhibit C-9, attachment 2 (pp. 2, 15-31); Exhibit C-10, attachment 2 (pp. 2, 15-31))

22. On August 18, 1999, in In the Matter of Welco Securities, Inc., William S. Shapiro and Kenneth S. Shapiro, SEC Administrative Proceeding File No. 3-9977), the SEC issued a consent order, based on the entry of the final judgment and order of permanent injunction in the civil action, that revoked Welco's broker-dealer registration and barred the Shapiros from association with any broker or dealer. (Exhibit C-3, pp. 26-28; Exhibit C-9, paras. 1315 and attachment 2 (pp. 1-3); Exhibit C-10, paras. 13-15 and attachment 2 (pp. 1-3); Exhibit C-11, paras. 13-15; Exhibit C-12, paras, 13-15)

C. Events Relating to the PSC

23. Or about September 26, 1983, Welco became registered with the PSC as a broker-dealer, and the Shapiros became registered with the PSC as agents of Welco. The Shapiros served as supervisors of Welco's registered representatives, with Kenneth Shapiro also serving as Welco's compliance officer. (Exhibit C-3, p.4; Exhibit C-6, p. 6; Exhibit C-9, attachment 1 (p.4); Exhibit C-10, attachment 1 (p.4); N.T. 84, 85)

24. Welco was an underwriter of Walnut and ELCOA securities by virtue of its agreements with those companies to manage and supervise the distribution of their securities. (Exhibit C-3, pp. 6, 8; Exhibit C-6, pp. 8,10; Exhibit C-9, attachment 1 (pp. 6,8); Exhibit C-10, attachment 1 (pp. 6, 8))

25. The Shapiros were "affiliates" of Welco, Walnut and ELCOA by virtue of their status as owners, officers and directors of those companies. (Exhibit C03, pp.4,5; Exhibit C-6, pp.6,7; Exhibit C-9, attachment 1 (pp. 4,5); Exhibit C-10, attachment 1 (pp. 4,5))

26. From September 1, 1996, through January 30, 1997, certain Walnut and ELCOA securities, known as Walnut Demand Certificates and Walnut Fixed Term Senior Thrift Certificates (collectively, "Walnut certificates") and ELCOA Demand Certificates and ELCOA Fixed Rate Certificates (collectively, "ELCOA certificates"), were not registered as securities with the SEC. By letters dated October 18, 1996, and October 25, 1996, Kenneth Shapiro advised the PSC that no offers or sales of ELCOA and Walnut certificates, respectively, would be made in Pennsylvania. (Exhibit C-3, pp. 5,6; Exhibit C-6, pp.7,8; Exhibit C-9, attachment 1 (pp. 5,6); Exhibit C-9, attachment 1 (pp. 5, 6))

27. From September 1, 1996, through August 8, 1997, Walnut certificates were offered and sold to at least five Pennsylvania residents, for an aggregate amount of at least $25, 072, and to additional persons outside of Pennsylvania. None of the Walnut certificates that were offered and sold to Pennsylvania residents were registered in Pennsylvania. (Exhibit C-3, p. 6; Exhibit C-6, p.8; Exhibit C-9, attachment 1 (p.6); Exhibit C-10, attachment 1 (p. 6))

28. From in or about May 1997 through July 1997, at least at two of Welco's registered agents used material misrepresentations to induce persons in and outside of Pennsylvania to purchase Walnut certificates

and to give fictitious residential addresses in states other than the states of their actual residence in order to execute the sales. Welco and the Shapiros knew or should have known about this practice. (Exhibit C-3, pp. 6,7; Exhibit C-6, pp. 8,9; Exhibit C-9, attachment 1 (pp.6, 7); Exhibit C-10; Exhibit C-10, attachment 1 (pp. 6, 7))

29. Welco and the Shapiros offered and sold Walnut certificates to investors without disclosing that the offers and sales were made in willful violation of Pennsylvania law. Some of the investors who purchased Walnut certificates did so without the benefit of a prospectus or any meaningful disclosure documents. (Exhibit C-3, p. 7; Exhibit C-6, p.9; Exhibit C-9, attachment 1 (p. 7); Exhibit C-10, attachment 1 (p. 7))

30. From on or about September 1, 1996, through August 8, 1997, at least 21 Pennsylvania residents, for an aggregate amount of at least $292,190, and to additional persons outside of Pennsylvania. None of the ELCOA certificates that were offered and sold to Pennsylvania residents were registered in Pennsylvania. (Exhibit C-3, pp. 7,8; Exhibit C-6, pp. 9,10; Exhibit C-9, attachment 1 (pp. 7, 8); Exhibit C-10, attachment 1 (pp. 7,8))

31. Of the 26 ELCOA certificates that were offered and sold in Pennsylvania, 21 were offered and sold by John J. McGarry, who was a registered agent with First Allied Securities of Warren, PA, but was not a registered agent with Welco. None of McGarry's sales of ELCOA certificates was authorized by First Allied Securities or recorded on its books. (Exhibit C-3, pp. 5, 8, 11; Exhibit C-6, pp. 7, 10, 13; Exhibit

C-9, attachment 1 (pp. 5, 8, 11); Exhibit C-10, attachment 1 (pp. 5, 8, 11))

32. Welco, the Shapiros and McGarry used a single fictitious address in New York as the home address of Pennsylvania residents to whom McGarry had sold ELCOA certificates. In some cases, the investor's Pennsylvania address on a purchase application was concealed with a typewriter correction strip reflecting the fictitious New York address, a practice about which the Shapiros knew or should have known. (Exhibit C03, p.8; Exhibit C-6, p. 10; Exhibit C-9, attachment 1 (p. 8); Exhibit C-10, attachment 1 (p. 8))

33. Investors in ELCOA certificates who inquired of ELCOA's state of affairs were told misrepresentations by one or more of Welco's registered representative, a practice about which Welco and the Shapiros knew or should have known. (Exhibit C-3, p. 9; Exhibit C-6, p. 11; Exhibit C-9, attachment 1 (p. 9); Exhibit C-10, attachment (p.9))

34. Welco and the Shapiros offered and sold ELCOA certificates to investors without disclosing that the offers and sales were being made in willful violation of Pennsylvania law. Some of the investors who purchased ELCOA certificates did so without the benefit of a prospectus or any meaningful disclosure documents. (Exhibit C-3, pp. 9,10; Exhibit C-6, pp. 11, 12; Exhibit C-9, attachment 1 (pp. 9, 10); Exhibit C-10, attachment 1 (pp. 9,10))

35. From in or about April 1997 through August 8, 1997, some of Welco's registered representatives, through misrepresentations and nondisclosures, induced in-

vestors either not to redeem or to delay redemption of Walnut and ELCOA certificates, a practice about which Welco and the Shapiro knew or should have known. (Exhibit C-3, p. 10; Exhibit C-6, p.12; Exhibit C-9, attachment 1 (p. 10); Exhibit C-10, attachment 1 (p.10))

36. Welco and the Shapiros recommended the purchase of Walnut and ELCOA certificates to investors without having reasonable grounds to believe that the recommendation was suitable for each investor's needs. (Exhibit C-3, pp. 9, 10; Exhibit C-6, p. 12; Exhibit C-9, attachment 1 (p. 10); Exhibit C-10, attachment 1 (p. 10)).

37. Welco's registered representatives recommended the purchase of Walnut and ELCOA certificates to investors without having reasonable grounds to believe that the recommendation was suitable for each investor's needs, a practice about which Welco and the Shapiros knew or should have known. (Exhibit C-3, p.11; Exhibit C-6, p. 13; Exhibit C-9, attachment 1 (p. 11); Exhibit C-10, attachment (p. 11))

38. Welco and the Shapiros failed to establish and maintain a system of securities laws and regulations in connection with Welco's securities business. (Exhibit C-3, pp.11, 12; Exhibit C-6, pp. 13,14; Exhibit C-9, attachment 1 (pp. 11, 12); Exhibit C-10, attachment 1 (pp. 11, 12))

39. Welco and the Shapiros failed to observe the fiduciary duty to act primarily for the benefit of Pennsylvania customers and to observe high standards of commercial honor and just and equitable principles of

trade in the conduct of business. (Exhibit C-3, p. 12; Exhibit C-6, p. 14; Exhibit C-9, attachment 1 (p. 12); Exhibit C-10, attachment 1 (p.12))

40. Welco and the Shapiros engaged in dishonest and unethical conduct in the securities business and took unfair advantage of customers. (Exhibit C-3, p. 12; Exhibit C-6, p.14; Exhibit C-9, attachment 1 (p. 12); Exhibit C-10, attachment 1 (p. 12))

41. On February 24, 1999, during the course of the PSC's investigation of their activities, Welco and the Shapiros filed a written notice with the NASD's central registration depository that Welco had ceased operations as of February 19, 1999. (Exhibits KS-4, KS-5, KS-6, WS-4, WS-5, WS-6)

42. On December 22, 1999, in In the Matter of Walnut Equipment Leasing Company, Inc., Equipment Leasing Company of America, Welco Securities, Inc., William Shapiro, Kenneth S. Shapiro and John J. McGarry (PSC Administrative Proceeding No. 9707-07), based on an offer of settlement submitted by Welco and the Shapiros, the PSC issued a consent order revoking the registration of Welco as a broker-dealer; revoking the registration as broker-dealer or being an affiliate of a broker-dealer; and permanently barring the Shapiros from being registered as broker-dealers or agents, being affiliates of a broker-dealer or agent, or acting as agents, promoters, officers, partners, or directors of an issuers of regulated securities. The order also directed Welco and the Shapiros to pay $20,000 in investigative and legal costs to the PSC and to desist from engaging in conduct that violates Pennsylvania law and regulations relating to se-

curities. (Exhibit C-3, pp. 1-25; Exhibit C-6, pp. 4-32; Exhibit C-9, paras. 6 and 8-10 and attachment 1; Exhibit C-10, paras. 6 and 8-10 and attachment 1; Exhibit C-11, paras. 6 and 8-10; Exhibit C-12, paras. 6 and 8-10)

43. The PSC's consent order incorporated factual findings consistent with those set forth in Findings of Fact Nos. 4, 5 and 23-40. The consent order also incorporated conclusions of law reflecting that Welco and Shapiros (1) sold unregistered securities, in violation of Section 201 of the Pennsylvania Securities Act of 1972 ("PA Securities Act"), 70 P.S. § 1-201; (2) employed an unregistered agent, in violation of Section 301(b); (3) made untrue statements of material facts and failed to disclosed material facts in connection with the offer and sale of securities, in violation of Section 401 (b) of the PA Securities Act, 70 P.S. §1-401(b); (4) induced the purchase of securities through the use of manipulative, deceptive or fraudulent schemes, devices or contrivances, in violation of Section 403 of the PA Securities Act, 70 P.S. §1-403, and Regulations 403.010(b) and 403.010(c), 64 Pa.Code §§403.010(b) and 403.010(c); (5) made false and misleading statements in a document filed with the PSC, in violation Section 407(a) of the PA Securities Act, 70 P.S. § 1-407(a); (6) willfully violated federal securities laws, in violation of Section 305(a)(v) of the PA Securities Act, 70 P.S. §-305(a)(v); (7) willfully aided and abetted another person in violating federal securities laws, in violation of Section 305(a)(vi) of the PA Securities Act, 70 P.S. §1-305(a)(vi); (8) failed to reasonably supervise Welco's agents, in violation of section 305 (a)(vii) of

the PA Securities Act, 70 P.S. § 1-305(a)(vii); (9) engaged in dishonest and unethical practices in the securities business and took unfair advantage of customers, in violation of Section 305 (a)(ix) of the PA Securities Act, 70 P.S. §1-305(a)(ix), and Regulation 305.019, 64 Pa. Code § 305.019; and (10) sold securities in Pennsylvania through and unregistered agent, in violation of Section 305(a)(xii) of the PA Securities Act, 70 P.S. 1-305(a)(xii). (Exhibit C-3, pp. 2-20; Exhibit C-6, pp. 4-22; Exhibit C-9, attachment 1 (pp.2-20); Exhibit C-10, attachment 1 (pp.2-20); Exhibit C-10, attachment 1 (pp.2-20))

D. Procedural Matters

44. On July 25, 2001, and December 20, 2001, the Shapiros were served by certified mail with copies of orders to show cause and amended orders to show causes, respectively. The orders to show cause and amended orders to show cause set forth the factual allegations and charges against the Shapiros and advised them of their right to a formal hearing and to retain legal representation. (Board Records)

45. On September 21, 2001, and February 19, 2002, the Shapiros filed answers to the orders to show cause and amended orders to show cause, respectively. (Board Records)

46. Formal hearings on the charges were held December 10, 2001, and August 28, 2002. The Shapiros, who are attorneys at law, represented themselves. (Board Records)

47. On November 27, 2002, the Shapiros filed post-hearing briefs. (Board Records)

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter.

2. The Shapiros have been afforded reasonable notice of the charges and an opportunity to be heard, in accordance with Section 504 of the Administrative Agency Law, 2 Pa.C.S. § 504.

3. The Shapiros are subject to disciplinary action under Sections 9.1(a)(8) and 9.1(a)(16) of the CPA Law as charged in the amended orders to show cause.

DISCUSSION

A. Disposition of Motions to Dismiss

The Shapiros maintain in their motions to dismiss that this dismissed because the formal hearing on the amended orders to show cause was not timely held as required under Section 3(d) of the Act of July 2, 1993, P.L. 345 ("Act 48 of 1993"), 63 P.S. §2203(d).

Section 3(d) of Act 48 of 1993 provides as follows:

"Hearing examiners

...

(d) Time periods. – In all disciplinary matters before a licensing board or commission, hearings shall commence within 90 days after the date on which an answer is filed. Any continuance granted prior to the commencement of the hearing shall toll the 90-day requirement by the period of the continuance. A decision shall be rendered within 180 days after the record is closed. The board or commission shall render a final adjudication or decision on any exceptions to the decision of a hearing examiner or on any applications, provided that a board or commission may delegate to a hearing examiner the authority to render a final adjudication or decision in such cases as deemed appropriate."

The Shapiros filed their answers to the amended orders to show cause on February 19, 2002. The formal hearing on the charges in the amended orders to show cause was held 190 days later, on August 28, 2002. Neither the Shapiros nor the Commonwealth had requested a continuance, although there were pending motions for summary judgment that the Shapiros had filed to the original orders to show

cause, the counts of which were restated in the amended orders to show cause. On August 6, 2002, four days after issuing a hearing notice for August 28, 2002, the Board denied the motions for summary judgment without prejudice to the Shapiros' making the same arguments in their post-hearing briefs, and scheduled the formal hearing on the amended charges for August 28, 2002.

Contrary to the Shapiros' assertions, the time periods for action set forth in Section 3(d) of Act 48 of 1993 are directory, not mandatory. In *Schulze v. Bureau of Professional and Occupational Affairs,* 794 A.2d 984, 988 (Pa. Cwmlth. 2002), *alloc. denied.,* 808 A.2d 574 (Pa. 2002), Commonwealth Court, in holding that the 180-day period fixed for decision-making by a licensing board was directory only, noted that while "the legislature may fix a time certain within which litigants must complete ministerial or procedural acts, such a mandate does not apply to an adjudicating body."

The Board concludes, therefore, that this disciplinary proceeding cannot be barred as untimely under Section 3(d) of Act 48.

B. Disposition of the Charges

Conclusive Effect of PSC's and SEC's Enforcement Actions

In their answers to the amended orders to the show cause, the Shapiros do not dispute that they consented to the SEC's issuance of an order in August 1999 that barred them from association with any broker or dealer and revoked the federal broker-dealer registration of Welco, the securities firm they directed. The Shapiros also do not dispute that they consented to the PSC's issuances of an order in December 1999 that revoked the registration of Welco as a broker-dealer in

Pennsylvania, revoked their registration as registered agents of Welco in Pennsylvania, and permanently barred the Shapiros from, among other things, being registered as broker-dealers or agents in Pennsylvania or being affiliates of a broker-dealer or agent in Pennsylvania.

The Commonwealth charged in counts 1 and 2 of the amended orders to show cause that the enforcement actions of the PSC and SEC, respectively, establish bases for disciplinary action against the Shapiros under Section 9.1(a)(8) of the CPA Law. The Commonwealth charged in count 3 of the amended orders to show cause that the PSC's enforcement action also establishes a basis of disciplinary action against the Shapiros under Section 9.1(a)(16) of the CPA Law, which took effect February 3, 1997.

Section 9.1(a)(8) and 9.1(a)(16) of the CPA Law provide as follows:

"Grounds for discipline

(a) In accordance with the procedure referred to in section 9 of this act, the board may revoke, suspend, limit or otherwise restrict the certificate of a certified public accountant or the registration of a public accountant, may revoke, suspend, limit or otherwise restrict any license issued under the act, may censure or publicly reprimand the holder of any certificate, registration or license, may require completion of general or a specific number of continuing professional education courses or may require more frequent peer review or other remedial action for any one or any combination of the following causes:

. . .

(8) Suspension or revocation of the right to practice before any Federal or State governmental agency.

. . .

(16) Engaging in unprofessional conduct. Discipline may be imposed under this clause whether or not actual injury or loss to a client is established."[27]

The Shapiros initially maintain that in consenting to the issuance of orders by the PSC and the SEC, they did not admit to committing violations of federal and state securities laws and regulations and that the consent orders cannot be conclusive evidence that such violations occurred.

In *Kahn v. State Board of Auctioneer Examiners*, 785 A.2d 512 (Pa. Cmwlth. 2001), *alloc. granted.* 798 A.2d 1293 (Pa. 2002), Commonwealth Court, in considering the due process requirements attendant to a reciprocal disciplinary action, held that a licensing board may take disciplinary action against a licensee based on another jurisdiction's disciplinary consent order where the order contains either the licensee's admission of misconduct or findings of fact regarding the alleged misconduct.

The pertinent part of the Shapiro's offer of settlement with the PSC states as follows:

"[Welco and the Shapiros], without admitting or denying the allegations therein solely for the purpose of settling this proceeding, consent to the issuance of the appended Findings

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[27] The Shapiros assert in their post-hearing briefs that Sections 9.1(a)(8) and 9.1(a)(16) of the CPA Law are unconstitutionally vague on their face. The Board has no authority, however, to rule on the constitutionally of any provision of the CPA Law.

of Fact, Conclusions of Law, and Order, which are incorporated herein by reference. [Welco and the Shapiros], without admitting or denying the allegations therein, consent to the imposition of the sanctions set forth in the Order." (Exhibit C-3, p.22; Exhibit C-6, p.24; Exhibit C-9, attachment 1 (p.22); Exhibit C-10, attachment 1 (p.22))

The findings of fact and conclusions of law entered by the PSC pursuant to the offer of settlement set forth the Shapiros' numerous violations of the PA Securities Act and companion regulations in connection with the offer and sale of securities by Welco. Because the Shapiros consented to the PSC's entry of specific factual findings and conclusions that they violated Pennsylvania securities law and regulations as well as to the imposition of sanctions based on the violations, the Board may consider the violations to have been conclusively established for purposed of this disciplinary proceeding. *Kahn, surpa.*

As regards the SEC's enforcement action, the SEC's order states, in part, as follows:

> "In anticipation of the institution of these administrative proceedings, Welco, William Shapiro and Kenneth Shapiro have submitted Offers of settlement ('Offers') which the [SEC] has determined to accept. Solely for the purposes of these proceedings and any other proceedings brought by or on behalf of the [SEC] or to which the [SEC] is a party, Welco, William Shapiro and Kenneth Shapiro, by their Offers, consent, without admitting or denying the findings contained herein, except that they admit that the [SEC] has jurisdiction over them and over the subject matter of these proceedings and admit to the entry of an order of permanent injunction as set forth in subparagraph II.4. below, to the entry of this Order Insti-

tuting Public Proceedings, Making Findings and imposing Remedial Sanctions . . ." (Exhibit C-3, p. 26; Exhibit C-9, attachment 2 (p.1); Exhibit C-10, attachment 2 (p.1))

The findings entered by the SEC's order include the fact that Welco and the Shapiros, without admitting or denying the allegations of the SEC's civil complaint, had consented to the federal district court's entry of an order permanently enjoining them from engaging in conduct that violates federal securities laws and regulations.

In an enforcement proceeding against a broker-dealer and its associated persons based on the issuance of a consent injunction entered as a result of the SEC's civil complaint alleging violations of the antifraud provisions of the securities laws, it has been the SEC's "traditional policy" that the allegations of the complaint may be given considerable weight in determining whether remedial sanctions are in the public interest. *In the Matter of Marshall E. Melton and Asset Management & Research, Inc.*, (SEC Administrative. Proceeding File No. 3-9865, issued July 25, 2003). Moreover, such broker-dealer and its associated persons may not collaterally attack the allegations of the injunctive complaint in the subsequent enforcement proceeding based on the injunction. *Kay, Real & Company,* 36 S.E.C. 373 (1955); *Samuel O. Forson,* 53 S.E.C. 31 (1997). The Board, therefore, considers the allegations of the SEC's civil complaint to be binding findings for purposes of this disciplinary proceeding. *Kahn, supra.*

PSC's and SEC's Enforcement Actions as Establishing Violation of Section 9.1(a)(8) of the CPA Law

The Commonwealth contents that the PSC's and SEC's enforcement actions against the Shapiros amounted to the suspension or revocation of their "right to practice" before the PSC and SEC under Section 9.1(a)(8) of the CPA Law. The Shapiros counter that Section 9.1(a)(8) of the CPA Law applies only to the right to practice public accounting and that, in any event, the PSC's and SEC's enforcement actions did not relate to their right to practice before those agencies.

The Board does not believe the scope of Section 9.1(a)(8) of the CPA Law is limited to actions that affect one's right to practice public accounting. Other disciplinary provisions of the CPA Law are defined in terms of their specific applicability to the practice of public accounting or one's status as a certified public accountant or public accountant, to wit: Section 9.1(a)(1), 63 P.S. §9.9(a)(1) (fraud or deceit in obtaining certificate, registration or license to practice under CPA Law): Section 9.1(a)(2), 63 P.S. § 9.9(a)(2) (committing dishonesty, fraud or gross negligence in the practice of public accountant or public accountant cancelled, revoked or suspended by another state or foreign jurisdiction). As the Commonwealth points out in its post-hearing brief, the General Assembly's omission of limiting language in Section 9.1(a)(8) of the CPA Law, when such limiting language appears in other disciplinary provisions of the CPA Law, implies that the General Assembly intended that the revocation or suspension of one's right to practice before any state or federal governmental agency applies any type of "practice" before such agency, not only to the practice or public accounting.

Moreover, the Board is of the view that the PSC's and SEC's enforcement actions – which essentially banished the Shapiros from any future involvement in the securities business because of their actions in defrauding the clients of their

securities firm Welco - - are related to the practice of public accounting. Public accounting embraces a broad range of financial-related services including, but not limited to, the giving of opinions or assurances as to financial information, the preparation of financial statements and the performance of other accounting activities, the preparations of tax returns, the giving of advice on financial planning and tax matters, and the valuation of businesses. See Section 2 of the CPA Law, 63 P.S. § 9.2 (relating to definitions). In no other profession or occupation is a practitioner entrusted with as much responsibility with regard to the financial affairs of a client as one credentialed to practice public accounting. Consistent with such responsibility, certified public accountants and public accountants and public accountants have a fiduciary obligation to render professional services with independence, integrity, objectivity, competence, full disclosure, confidentiality, and adherence to generally accepted auditing standard and accounting principles. See, 49 Pa. Code §§11.21-11.35 (relating to licensee's relations with clients and public). Certified public accountants and public accountants are specifically commanded not to knowingly misrepresent facts in the course of a professional engagement, 49 Pa. Code § 11.22, or to advertise for or solicit engagements through the use of fraudulent, misleading, or deceptive statements or claims. 49 Pa. Code §§ 11.33 and 11.34.

Like certified public accountants and public accountants, persons engaged in the securities business stand in a fiduciary relationship with their clients and, as such, have a duty to act in their clients' best interests. See, PSC Regulation 305.019, 64 Pa. Code § 305.019 (declaring registrants under the PA Securities Act to be fiduciaries). As amply reflected in the factual findings and legal conclusions underlying the PSC's and the SEC's enforcement actions against them, the

Shapiros conducted their securities business pursuant to a fraudulent scheme in which they were sought to further their own financial interests at the expense of the financial interests of their clients. Such misconduct is plainly relevant to the Shapiros' fitness to discharge the fiduciary duties of those credentialed to practice public accounting.

The Board also believes that the PSC's and SEC's enforcement actions against the Shapiros involved the suspension or revocation of their "right to practice" before those agencies. Section 102(f) of the SEC's Rules of Practice, 17 C.F.R. §201.102(f), provides the "practicing before the [SEC] shall include, but not be limited to ... transacting any business with the [SEC] . . . ." SEC Regulations 17a-3, 17a-4 and 240.17a-25, require a registered broker-dealer to maintain detailed records of its activities and to make those records available to the SEC upon request, while SEC Regulation 17a-5, 17 C.F.R. §240.17a-5, requires a registered broker-dealer to file periodic reports of its activities with the SEC, including audited financial statements. As principals of Welco, a registered broker-dealer, the Shapiros were responsible for Welco's compliance with the SEC's record-keeping and reporting requirements and, in so doing, they transacted business with the SEC. The SEC's consent order restricted the Shapiros' right to practice before the SEC by revoking Welco's broker-dealer registration and barring the Shapiros' right to practice before the SEC by revoking Welco's broker-dealer registration and barring the Shapiros from association with any broker or dealer. The Board concludes that the SEC's enforcement action against the Shapiros was tantamount to the revocation or suspension of their right to practice before the SEC under Section 9.1(a)(8) of the CPA Law.

Neither the PA Securities Act nor the regulations of the PSC define what is meant to "practice" before the PSC. In the absence of such definition, it is appropriate to look to federal securities laws and regulations for guidance in interpreting the PA Securities Act. See, Martin v. ITM/International Trading & Marketing, Ltd., 494 A.2d 451 (Pa. Super. 1985). When the SEC's definition of "practice" is applied to the PSC, it is clear that the Shapiros transacted business with the PSC. As registered agents of Welco, a registered broker-dealer with the PSC, the Shapiros had an obligation provide the PSC with current information about their registration status. PSC Regulation 303.013, 64 Pa. Code §303.013. Moreover, the PSC, like the SEC, requires a registered broker-dealer to maintain records that are subject to the PSC's review and to file periodic reports with the PSC. PSC Regulations 304.011 and 304.021, 64 Pa. Code §§304.011 and 304.021. As Welco's principals, the Shapiros were responsible for ensuring Welco's compliance with PSC's record-keeping and reporting requirements. The PSC's consent order revoked the registrations of Welco and the Shapiros and permanently barred the Shapiros from any affiliation with a broker-dealer, an agent or an issuer of securities. The Board concludes that the PSC's enforcement action against the Shapiros amounted to the revocation or suspension of their right to practice before the PSC under Section 9.1(a)(8) of the CPA Law.

PSC's Enforcement Action as Establishing Violation of Section 9.1(a)(16) of the CPA Law

The Commonwealth also contends in its amended orders to show cause that the PSC's enforcement action against the Shapiros established that they had engaged in "unprofessional conduct" under Section 9.1(a)(16) of the CPA Law.

Unprofessional conduct is defined in Section 9.1(c) of the CPA Law, 63 P.S. §9.9a(c), as follows:

"Grounds for discipline

. . .

(c) For purposes of this section, 'unprofessional conduct' means:

(1) undertaking to perform professional services that the certified public accountant, public accountant or firm cannot reasonably expect to complete with professional competence;

(2) failure to exercise due professional care in the performance of professional services;

(3) failure to adequately plan and supervise the performance of professional services;

(4) failure to obtain sufficient data to afford a reasonable basis for conclusions or recommendations in relation to any professional service performed;

(5) failure to comply with the standards promulgated by any recognized public or private standard-setting body that is applicable to the professional service being performed."

The Commonwealth asserts that the PSC is a recognized public standard-setting body within the meaning of paragraph (5) of Section 9.1(c) of the CPA Law; that the PSC has adopted Regulation 305.019, 64 Pa.Code §305.019, which proscribes certain types of unethical and dishonest practices by broker-dealers, agents, investment advisers, and investment adviser representatives; and that the PSC's enforcement

action incorporated findings that the Shapiros had violated the standards set forth in Regulation 305.019.

The Shapiros maintain, however, that the recognized standard-setting body referenced in paragraph (5) of Section 9.1(c) of the CPA Law must be a body that prescribes standards for certified public accountants and that even if the PSC were a recognized standard-setting body, there is no evidence that the Shapiros violated any PSC ethical standard after February 3, 1997, the effective dated of Section 9.1(a)(16) of the CPA Law.

Section 9.1(a)(16) of the CPA Law does not, by its language, restrict unprofessional conduct to the realm of public accounting; nor does Section 9.1(c) of the CPA Law define unprofessional conduct in a way that limits its meaning to misconduct that occurs in the course of rendering public accounting services. The Board believes unprofessional conduct may include misconduct committed by certified public accountants or public accountants when rendering professional services to clients other that public accounting clients. The Board agrees, therefore, with the Commonwealth that the PSC is a "recognized public standard-setting body," as that term is used in paragraph (5) of section 9.1 (c) of the CPA Law, regarding the ethical responsibilities of those credentialed under the PA securities Act to provide services to the investing public.

PSC Regulation 305.019 proscribes, in pertinent part, conduct "such as forgery, embezzlement, nondisclosure, incomplete disclosure or misstatement of material facts, or manipulative or deceptive practices or taking unfair advantage of a customer or former customer in any aspect of a tender offer. . . ." The PSC, in its enforcement action, specifically found the Shapiros to have violated Regulation

305.019. Among the PSC's factual findings supporting this conclusion of law were that Walnut and ELCOA certificates were offered and sold to investors between September 1996 and August 1997; that Welco and the Shapiros recommended the certificates to investors without disclosing that the offer and sale was being made in wilful violation of the PA Securities Act, without having reasonable grounds to believe that the recommendation was suitable for each investor's needs and, in some cases, without providing investors with a prosepectus or other meaningful disclosure document; and that the Shapiros used a fictitious out-of-state address for certain unregistered ELCOA certificates that were sold to Pennsylvania investors.

Inasmuch as the PSC found that the Shapiros had violated its ethical standards by engaging in a pattern of corrupt and dishonest practices that extended well beyond February 3, 1997, the effective dated of the addition of Section 9.1(a)(16) to the CPA Law, the Board concludes that the Shapiros engaged in unprofessional conduct as charged in the amended orders to show cause.

C. Consideration of the Disciplinary Sanctions

The Shapiros' violations of Sections 9.1(a)(8) and 9.1(a)(16) of the CPA Law expose them to being censured or reprimanded; to being required to undergo remedial action such as continuing education or peer review; or to having their CPA credentials restricted, suspended or revoked. Under Section 16(c) of the CPA Law, 63 P.S. §9.16(c), the Shapiros are also each subject to being assessed a civil pen-

alty of up to $1,000 for each of their violations of the CPA Law.[28]

The Board considers the Shapiros' violations extremely serious. As amply reflected by the record before the PSC and the SEC, the Shapiros, through their securities firm Welco, carried out a scheme from 1988 to mid-1997 that defrauded thousands of unsophisticated investors nationwide, including many residing in Pennsylvania, of tens of millions of dollars through the sale of highly speculative (and, ultimately, virtually worthless) securities in two financially-troubled companies owned by the Shapiros. Specifically, the Shapiros failed to ensure that the securities were registered in all states where they were offered and sold; failed to adequately supervise the activities of persons who offered and sold the securities, including the compliance of such persons with registration requirements; failed to provide some investors with prospectuses and other meaningful disclosure documents; failed to advise investors of the risky nature of the securities and of the offering's noncompliance with securities laws; failed to make a determination about suitability of an offering for each investor's needs; induced investors in

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[28] Section 16 (c) of the CPA Law provides, in pertinent part, as follows:

"Penalties

. . .

(c) In addition to any other civil remedy or criminal penalty or discipline provided for in this act, the board may levy a civil penalty of up to one thousand dollars ($1,000) on any person for a violation of any provision of this act . . . The maximum civil penalty that may be levied by the board shall not be more than two hundred dollars ($200,000) for any related series of violations."

states where the securities were not registered to give false address information on their applications in order to conceal the lack of compliance with registration requirements; and failed to maintain complete and accurate records of the securities transactions.

The Board does not consider it a mitigating circumstance that the Shapiros' misconduct did not involve the actual practice of public accounting.[29] The threshold attribute that the public has the right to expect of those who possess the credential of certified public accountant is good moral character. The Shapiros' fraudulent conduct in transacting their securities business manifestly reveals them to be persons lacking good moral character.

The Board believes the revocation of the Shapiros' CPA credentials is warranted in this disciplinary proceeding in order to eliminate the risk of fraudulent behavior being directed at those who retain the Shapiros' services as certified public accountants; to deter others credentialed as certified public accountants from engaging in fraudulent behavior either within or outside the practice of public accounting; and to maintain public confidence in the effectiveness of the state regulation of the public accounting profession.

Accordingly, the Board enters the following Order.[30]

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[29] The Shapiros also testified that they did not sell securities to their public accounting clients; that they only referred to their CPA credentials to the extent required under securities laws to provide biographical data in prospectuses of securities offerings; and that an outside public accounting firm preformed auditing and other professional services for Welco. (N.T. 72, 73, 92-98)

[30] The Shapiros contend in their post-hearing brief that they were denied due process because of "prosecutorial bias" and a "com-

mingling of advisory and prosecutorial functions." The Shapiros provide no examples of the purported prosecutorial bias. In support of their commingling claim, the Shapiros state that the Commonwealth's prosecuting attorney and Board counsel are employed in the same agency (i.e., Bureau of Professional and Occupational Affairs), sharing the same mailing address, and that the prosecuting attorney and Board counsel had an off-the-record discussion during the formal hearing on August 28, 2002.

Due process is not automatically violated merely because two attorneys from the same agency perform different roles in the same proceeding; the record must disclose and actual commingling of prosecutorial and adjudicatory functions or activities. *Shah v. State Board of Medicine*, 589 A.2d 783 (Pa. Cmwlth. 1991). Neither Board counsel nor any member of the Board had a role in the Commonwealth's decision to file disciplinary charges against the Shapiros. The off-the-record discussion cited by the Shapiros was, as the hearing transcript plainly reflects, a three-way conversation among the Shapiros, the prosecuting attorney, ad Board counsel prior to the start of the formal hearing regarding the Shapiros' planned objections to the Commonwealth's evidence.

The Shapiros also mischaracterize Board counsel's role as an "adjudicator" because there was no Board member present at the formal hearing on August 28, 2002. Board counsel serves as a legal advisor to the Board, but has no role in the adjudication of charges, including assessment of the credibility of witnesses, which is a function reserved to Board members. Board counsel's role at the August 28 hearing was to develop and evidentiary record for review by the Board. The hearing transcript and other evidence were sufficient to enable the Board to assess the credibility of the Shapiros' testimony. The Board's review of the record included all evidence proffered by the Shapiros, including that which was ruled at the hearing to be inadmissible in whole or in part.

ORDER

AND NOW, this 10th day of October, 2003, based on the foregoing Findings of Fact, Conclusions of Law and Discussion, the State Board of Accountancy orders that the certificate of certified public accountant (No. CA-013872-L) and current biennial license issued to Respondent Kenneth Steven Shapiro, CPA, be revoked, effective November 10, 2003, and that the certificate of certified public accountant (No. CA-002865-L) issued to Respondent William Shapiro, be revoked, effectively immediately.

Kenneth Shapiro shall immediately surrender his original certificate of certified public accountant (issuance date of January 29, 1979) and current license documents (expiration dated April 30, 2004) to Board counsel by November 10, 2003. William Shapiro shall immediately surrender his original certificate of certified public accountant (issuance date of April 25, 1950) to Board counsel.

This Adjudication and Order will be deposited in the mail on this date.

Bureau of Professional and Occupational Affairs	State Board of Accountancy
Scott J. Messing, Deputy Commissioner	James P. Keasey, CPA, Chairman

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